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ANNOTATED FORMS
OF
PLEADING AND PRACTICE
AT
COMMON LAW

AS MODIFIED BY STATUTES

For Use in All Common-Law States and Especially Adapted to the
States of Illinois, Michigan, Mississippi, Florida, Virginia,
West Virginia, Maryland and District of Columbia

BY
JOHN LEWSON
OF CHICAGO AND SPRINGFIELD BARS
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IN THREE VOLUMES

VOLUME II

CHICAGO
T. H. FLOOD & COMPANY

1914

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CHAPTER XXV

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IN GENERAL

1714 Action, maintenance

Debt is an appropriate remedy only when the sum to be recovered is certain or when it may be rendered certain by computation.¹ Unliquidated damages cannot be made the subject of an action of debt.²

PARTIES

1715 Sureties

A suit on a surety bond against one of two obligors is maintainable unless the non-joinder of the other is pleaded in abatement.³

1716 Third persons

A third person cannot sue on a bond which was entered into by others, unless the bond was entered into directly and primarily for his benefit.⁴

DECLARATION REQUISITES

GENERALLY

1717 Capacity to sue, township

In an action of debt by a township in its corporate name it is not necessary to allege in the declaration that the township had been regularly incorporated.⁵

¹ Haynes v. Lucas, 50 Ill. 436, 438 (1869); Stewart v. Sprague, 71 Mich. 50, 59 (1888).

² Haynes v. Lucas, *supra*.

³ Porter v. Leache, 56 Mich. 40, 41 (1885).

⁴ Searles v. Flora, 225 Ill. 167, 172 (1907).

⁵ Morris v. School Trustees, 15 Ill. 266, 270 (1853).

1718 Obligation, joint and several

In an action of debt by one of the obligees on an obligation to several persons accruing to their relative and respective interests, the declaration must allege the extent of the several interests, so that a court might determine the relative and respective right of the plaintiff.⁶ If a joint obligor is dead, he must not be noticed in the declaration nor should the survivors be declared against as such, but they should be sued, as if they alone were primarily liable.⁷

1719 Words and phrases

A declaration in debt must use the word "agree," not "promise."⁸

DECLARATION UPON BOND

1720 Consideration

A declaration on a common law bond is good without averring a consideration, as the seal imports it.⁹

1721 Delivery

In declaring upon a bond no averment of delivery is necessary, especially where profert is made.¹⁰

1722 Conditions and breaches

In an action upon a bond, the declaration should set out the conditions of the bond and assign specific breaches.¹¹ On a penal bond, a plaintiff may assign in one count, as many breaches as he deems necessary, or he may file as many counts as there are breaches of the bond. When a single count contains several branches, each breach answers the place of a separate count and may be subject to a demurrer the same as a distinct count.¹² The assignment of a breach must be specific, not general.¹³

⁶ St. Louis, Alton & Rock Island R. Co. v. Coultas, 33 Ill. 188 (1864).

⁷ Cummings v. People, 50 Ill. 132, 134 (1869).

⁸ Guinnip v. Carter, 58 Ill. 296 (1871).

⁹ Boyer v. Sowles, 109 Mich. 481, 485 (1896).

¹⁰ Boyer v. Sowles, *supra*.

¹¹ People v. McHatton, 2 Gilm.

731, 732 (1845); Patrick v. Rucker, 19 Ill. 428, 439 (1858); Albin v. Talbott, 46 Ill. 424, 427 (1868); Greene County v. Smith, 3 Scam. 227, 232 (1841).

¹² Hibbard v. McKindley, 28 Ill. 240, 253 (1862).

¹³ Greene County v. Smith, 3 Scam. 231.

1723 Joinder of counts

A count upon an official bond and a count upon a simple bond cannot be joined in one action.¹⁴ Counts in debt cannot be joined with counts in assumpsit.¹⁵ In a declaration in debt it is not permissible to add a count in assumpsit for interest, for the reason that there can be no joinder of counts in debt and assumpsit.¹⁶

SPECIAL CAUSES AND DECLARATIONS

1724 Administrator's bond, demand

It is not necessary under Illinois statute that a demand shall be made upon an executor or administrator to pay any moneys or dividend in accordance with an order of court before a suit can be maintained against either of them and their bondsmen upon the bond, or that a period of thirty days shall elapse between the demand and the bringing of suit upon such a bond.¹⁷

In actions upon a bond of an executor or an administrator whose letters have been revoked, it is not necessary to allege in the declaration that a demand was made upon the administrator or executor for the amount due the estate.¹⁸

1725 Administrator's bond, Narr. (Ill.)

¹⁹ For that whereas, on, to wit, the day of, 19.., one B died intestate in the county of and state of Illinois, leaving a large amount of personal estate in said county. That the said decedent left him surviving his widow,, and the following children, and no other child or children of any child, viz.: J, a son; R, a daughter; S, B and the defendant, D, who are his only children and heirs at law. That the said defendant, D, then was and ever since has continued to be a resident of the state of Illinois. That the said defendant, D, on proceedings duly had, was by the probate court of said county, on, to wit, the day of, 19.., duly appointed administrator of the estate of B, deceased, and thereupon duly qualified as such administrator.

¹⁴ Patrick v. Rucker, *supra*.

¹⁵ Guinnip v. Carter, 58 Ill. 297.

¹⁶ Guinnip v. Carter, *supra*.

¹⁷ McDonald v. People, 222 Ill. 325, 330 (1906); Sec. 115, c. 3, Hurd's Stat. 1911, p. 31; Sec. 13, c. 103, Hurd's Stat. 1911, p. 1624. Any-

thing said in Frank v. People, 147 Ill. 105, 111 (1893) to the contrary, overruled.

¹⁸ Nevitt v. Woodburn, 160 Ill. 203, 214 (1896); Par. 39, c. 3, Hurd's Stat. 1911, p. 16.

¹⁹ See Section 211, Note 60.

That the said defendant, D, then and there entered into bond with the defendants, H and M, as the good and sufficient security required by the statute in that behalf, in double the value of the personal estate, to wit, dollars, according to the statute in such case made and provided, and conditioned as the statute then in force required and as more particularly hereinafter set out.

That the said bond was thereafter signed and sealed by the said administrator and his said securities, attested by the then clerk of the probate court of county, and filed in his office; and which said bond was, on, to wit, the day of, 19.., duly approved by the said probate court of county.

And the defendants there and then, viz., on the day of of, 19.., by their writing obligatory under their respective hands and seals bearing date the said day of, 19.., jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in the penal sum of dollars current money of the United States, for the payment of which well and truly to be made the defendants bound themselves, their heirs, executors and administrators jointly and severally.

That said writing obligatory was and is subject to a certain condition thereunder written, to the effect that if the said D, administrator of all and singular the goods, chattels, rights and credits of said B, deceased, should make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels, rights and credits of said deceased, which should come to the hands, possession or control or knowledge of him, the said D, as administrator, or to the hands of any person or persons for him; and the same so made should exhibit, or cause to be exhibited, in the probate court of county, according to law; and such goods, chattels, rights and credits should well and truly administer, according to law; and all the rest of the said goods, chattels, rights and credits, which should be found remaining upon the account of the administrator, the same being at first examined and allowed by the court, should deliver and pay unto such person or persons respectively as might legally be entitled thereto; and should further make a just and true account of all his acts and doings therein, when thereunto required by the said court; and if it should appear that any last will and testament was made by the said deceased, and the same should be approved in court and letters testamentary or of administration obtained thereon, the said D, on being required thereto, should render and deliver up the letters of administration granted aforesaid; and should in general do and perform all other acts which might at any time be required of him by law, that then the said obligation was to be void; otherwise to remain in full force and effect and virtue, as by the said writing obligatory and the

said condition thereof, remaining upon the files of said court, will more fully appear.

That thereupon the said D then and there took upon himself the administration of said estate and from thence hitherto has been and still is such administrator.

But the plaintiff avers that the said defendant, D, has not faithfully performed the acts required of him, or his duties as such administrator, according to the terms of the said conditions of the said writing obligatory, but has wholly failed and refused so to do, to the injury of said J, R, S, B and G.

And plaintiff alleges as a breach of the said condition of the said writing obligatory, that heretofore, to wit, on the said day of, 19.., there came to the hands of said D, as such administrator, a large sum of money, to wit, the sum of dollars, which it became and was the duty of the said defendant, D, as such administrator, to hold and keep and well and truly administer according to law and deliver and pay unto such persons respectively as might be legally entitled thereto; but the plaintiff alleges that the defendant, D, administrator, wholly unmindful of his duty as aforesaid, wholly failed so to do, but delivered and paid the whole of said fund to persons not legally entitled thereto, to wit, to the defendant, H, without any order of the court therefor.

Plaintiff alleges that afterwards, on, to wit, the day of, 19.., the said defendant, D, as such administrator, filed in the probate court of county his certain report and account in and by which the said administrator showed to the probate court of said county that he had loaned of the funds in his hands as such administrator, the sum of dollars to the said H and E H, his wife, which said sum has been lost, by reason of the fact that the said H and E H have become insolvent and the securities given to secure the same have become valueless.

That thereupon the said probate court of said county entered an order, disapproving said report and account and disallowing the said claim of said administrator for credit in his said account for the amount of his said loan, and directing the said administrator to make and present to the court a new report and account, from which said claimed credit be omitted.

That afterwards, to wit, the day of, 19.., the said defendant, D, as such administrator, under the direction of the said probate court of county, made and filed in the office of the clerk of said probate court and presented to said probate court, a new account and report, in and by which it appeared that there was in the hands of such administrator, of the assets of said estate, certain sums due from such administrator to the various persons for whose use this suit was brought as aforesaid; that is to say, there

was due, widow of said decedent, as her distributive share of the assets of said estate, after charging her and allowing the administrator credit for all sums paid to her or for her use by said administrator, the sum of dollars as the unpaid balance of her distributive share of the estate of said decedent; that there was due to R, after giving to said administrator credit for, and charging her with all sums paid to her or for her account by said administrator, the sum of dollars as the unpaid balance of her distributive share in the estate of said decedent; that there was due to S, after giving to said administrator credit for, and after charging her with all sums paid to her or for her account by said administrator, the sum of dollars as the unpaid balance of her distributive share in the estate of said decedent; that there was due to B, after giving to said administrator credit for, and after charging him with all sums paid to him or for his account by said administrator the sum of dollars as the unpaid balance of his distributive share in the estate of said decedent.

That there was also due and unpaid to G, the attorney of the said estate, dollars, and unpaid court costs amounting to the sum of dollars.

That thereafter, to wit, on the day of, 19.., upon proceedings duly had, in the said probate court of county, before the judge thereof, it was by the said court finally adjudged that the aforesaid amounts respectively were held by the said defendant, D, as such administrator for the use of the parties aforesaid; and it was by the consideration and judgment of said court ordered and decreed that such administrator do pay within five days from the making of said order to the parties severally entitled to the said sums of money; that is to say, that he should pay the said costs and attorneys' fees:

That he should pay to \$.

That he should pay to R \$.

That he should pay to S \$.

That he should pay to B \$.

The plaintiff alleges that although more than five days have elapsed since the making of said order, and although after the expiration of said period of five days each of the persons for whose use this suit is brought demanded of the said D that he pay to them the amounts due to them respectively, as per the terms of said last named order and decree of said probate court of county; yet the said defendant, D, administrator, as aforesaid, has wholly failed and refused, and still does refuse to pay to the persons so entitled as aforesaid, the whole or any part so found due as aforesaid.

And the plaintiff assigns as a further breach of the condition of said writing obligatory, that, on, to wit, the day of, 19.., there was in the hands of the said

administrator, after the payment of all debts, expenses of administration and all other lawful charges against the said estate of B, deceased, the following named sums in the hands of such administrator, as their respective distributive shares of the estate of said decedent in his hands; that is to say, that there was in his hands as such administrator the sum of \$..... as the unpaid balance of the distributive share of said, widow of said decedent, also the sum of \$..... as the unpaid balance of the distributive share of S, daughter of said decedent, also the sum of \$..... as the unpaid balance of the distributive share of R, daughter of said decedent, also the sum of \$..... as the unpaid balance of the distributive share of B, son of said decedent.

That in addition to said sums so as aforesaid held by him for the said distributees as aforesaid, the sum of \$....., the unpaid attorney's fees of G, the attorney of said estate, in the management of said estate, and the sum of \$....., unpaid costs of administration.

That thereupon, on, to wit, the day of, 19.., the said defendant, D, as such administrator, filed in the probate court of county his final account and report showing the facts.

That thereupon, by the consideration and judgment of the said probate court of county, it was by said court ordered, adjudged and decreed that the final account and report of said administrator be approved, and that the said administrator pay said unpaid costs of \$....., and the said attorney's fees of \$....., and to the sum of \$....., and to R the sum of \$....., and to S the sum of \$....., and to B the sum of \$.....

But the said D, administrator as aforesaid, wholly unmindful of his duty in the premises, has not paid the said sums of money or any part thereof, but has wasted the said moneys and effects, and wholly fails and refuses to pay any part thereof to the parties so as aforesaid entitled thereto. By means of which premises, an action has accrued to the plaintiff for the use aforesaid, in the said sum of \$.....

Yet, the defendants, though requested thereto, have not paid to the plaintiff or to any of the persons for whose use this suit is brought, the said sum of money or any part thereof, but refuse so to do, to the damage of the plaintiff for the use aforesaid in the sum of \$.....

And therefore for the use aforesaid this suit is brought.

Affidavit of amount due

(Venue)

....., being duly sworn upon his oath, says that he is the attorney for the plaintiff in the above entitled cause, that the demand of the plaintiff is for the damages resulting from the breaches of the condition of the bond of D, as ad-

ministrator of the estate of B, deceased, executed by the said D, as principal, and by H and M, as sureties, the said breaches consisting in the failure of the said administrator to pay in accordance with the order of the probate court of county, to the persons for whose use this suit is brought, the several sums found to be due by the said probate court and ordered by the said probate court to be paid to them respectively; that is to say, to G, \$.....; to, \$.....; to S, \$.....; to R, \$....., and to B, \$.....; that the amount due plaintiff for the use aforesaid from the defendants, after allowing to the defendants all their just credits, deductions and set-offs, is \$.....

.....
 Subscribed, etc.

1726 Appeal bond, action, gist

The gist of an action on an appeal bond is the nonpayment of the judgment rendered on appeal.²⁰

1727 Appeal bond, declaration requisites

A declaration on an appeal bond given in a case appealed from a justice of the peace is sufficient if it sets forth the execution and contents of the bond and then alleges, with reasonable certainty, a trial of the case on appeal, an affirmance of the judgment, and nonpayment thereof, without averring jurisdiction in the justice or the filing of the bond.²¹

1728 Bond to remove obstructions from leased premises, Narr. (Ill.)

For that whereas the defendants, on the day of, 19.., in, in the county of and state of Illinois, by their writing obligatory bearing date of that day, did jointly and severally acknowledge themselves to be held and firmly bound unto the plaintiff in the sum of (.....) dollars, above demanded to be paid to the plaintiff, which said writing obligatory was and is subject to a certain condition thereunder written. Whereby after reciting to the effect that the above bounden had leased from the day of, 19.., to the day of, 19.., the following described premises, to wit: (Insert legal description of property). And that said was desirous of erecting thereon a bathing establishment, driving

²⁰ Smith v. Whitaker, 11 Ill. 417, 419 (1849).

²¹ Smith v. Whitaker, 11 Ill. 418.

certain piles into the ground therefor and making other alterations and improvements in furtherance of the promotion of said bathing establishment, and that said plaintiff,, claimed to own or hold some right, title or interest in said premises, it was provided that said should remove or cause to be removed off and from the said premises hereinbefore described, all erections, piling or improvements of all kind that he should thereafter erect upon said premises before or by the expiration of the term of his said lease of said premises, and that he would restore said premises to the same condition they were in at the date of said lease at his said own cost and expense; that in such case said obligation should be void and of no effect, but that otherwise it should remain in full force, as by the said writing obligatory and the said condition thereof in the possession of plaintiff and ready to be produced in court will appear.

And although the term of said lease as recited in said writing obligatory has long since expired, the said defendant,, has not removed from the said premises all erections, piling and improvements erected thereon and has not restored said premises to the same condition they were in at the date of said lease, but so to do has wholly failed and refused; and that said buildings and improvements erected upon said premises by said still remain and encumber said premises; whereby an action has accrued to the plaintiff to demand of the defendant the said sum of dollars above mentioned. Yet, the defendant, though often requested, has not paid to the plaintiff the said sum of money demanded or any part thereof, but has wholly refused so to do, to the damage, etc.

1729 Constable's bond, action

The sureties on a constable's bond are liable for an act done by the officer in his official capacity under color and by virtue of his office.²² In Maryland the sureties are liable only for a breach of an official duty.²³

1730 Commissioner's bond, Narr. (W. Va.)

For this, to wit, that heretofore, to wit, on the day of, 19.., and, in his lifetime, and who is now deceased, by their certain writing obligatory, sealed with their seals, and delivered to the plaintiff, and to the court now here shown, the date whereof is the day and year aforesaid, jointly and severally acknowledged themselves, their executors, administrators and assigns to be held and

²² Greenberg v. People, 225 Ill. 174, 179 (1907).

²³ State v. Dayton, 101 Md. 598, 599 (1905).

firmly bound unto the town of, in the sum of dollars, above demanded to be paid to the plaintiff; to which said writing obligatory a condition was and is annexed to the effect following, to wit: The condition of the above obligation is such that whereas, the above named, (the blank in the bond not being filled, but meaning the above), has been appointed one of the commissioners of, now, therefore, if the said shall faithfully perform the duties of bond commissioner and account for and pay over all money that may come into his hands (meaning into the hands of), by virtue of said office as the council may direct and as the law provides, then said obligation to be void, otherwise to remain in full force and virtue.

And the plaintiff avers that the town of, on, 19.., passed an ordinance authorizing the issue and sale of bonds of the town of, West Virginia, and the application of the proceeds to the paving and sewerage of the streets of the said town, under which ordinance and were appointed as commissioners to sell said bonds, and to perform other duties in the said ordinance set forth, which said ordinance was ratified at a special election held for said purpose on the day of, 19.., which said ordinance also provided for a bond to be given by each of said commissioners under which said ordinance the bond as aforesaid was executed.

And the plaintiff avers that the said did not faithfully discharge the duties of bond commissioner, and did not account for and pay over the moneys coming into his hands as such, as the town council of directed and as the law provided, but therein made default; and for assigning a breach of the condition of said bond, the plaintiff further avers, that on and after the said day of, 19.., and during his continuance in the office of bond commissioner as aforesaid, the said collected, received and became charged with as such bond commissioner, for the use of the town of, the sum of \$.....

And the said plaintiff further avers that the said town of did, on the day of, 19.., make and pass an order and duly enter the same of record in which the said town of directed the said and as bond commissioners to pay the sum of \$....., part of the above \$....., over to, town sergeant of the town of, of which the said bond commissioners aforesaid and said defendant administrator had notice.

And the plaintiff further avers that it has demanded of and from said bond commissioner aforesaid and of and of the said commissioners and of, adminis-

trator of the estate of, deceased, the whole amount of money so received by him as aforesaid, to wit, the sum of \$....., of which the said and said defendant, administrator, had notice.

And being so indebted to the town of, in the sum of money aforesaid, with interest thereon as aforesaid, the said defendant administrator as aforesaid, though often requested, did not, nor did any one for him, pay to the said town of, or to, sergeant of the town of, or to any other person authorized to receive the same, the said sum of money and interest thereon as aforesaid, or any part thereof, but to pay the same or any part thereof wholly failed and refused and still doth refuse.

And so the plaintiff says that by reason of the breaches of the condition of the said bond above assigned as aforesaid, an action hath accrued to the said plaintiff to demand and have of the said defendant administrator the sum of (.....) dollars first above mentioned.

Yet, the said, bond commissioner, has not paid, nor the said bond commissioners, and the said in his lifetime did not pay, nor hath the said defendant administrator as aforesaid, since the death of the said, as yet paid the above sum of (.....) dollars above demanded or any part thereof, to the said plaintiff (although often requested so to do), but the said in his lifetime so to do wholly refused, and the said defendant administrator as aforesaid, ever since the death of the said, hitherto hath wholly refused and still doth refuse to pay the same, or any part thereof, to the said plaintiff, to the plaintiff's damage, \$.....

And the said plaintiff brings here into court the said writing obligatory, sealed as aforesaid, which gives sufficient evidence to the court here of the debt aforesaid, in form aforesaid the date whereof is a certain day and year therein mentioned, to wit, the day and year in that behalf above mentioned. Therefore, it sues.

Town of,
a municipal corporation,
by counsel.

.....
Counsel.

1731 Contractor's bond, contract abandoned, Narr. (III.)

For that whereas, the defendants, on, to wit, the day of, 19.., by their writing obligatory bearing date of that day, sealed with their seals, jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in the sum of dollars, above demanded, lawful money of the United States, for the pay-

ment of which they acknowledged themselves, their heirs, executors and administrators to be bound jointly and severally; that said writing obligatory was and is subject to a certain condition therein written, reciting that the above bounden and had entered into a certain contract in writing with said, bearing date the day of, 19.., for the furnishing of labor and materials in and about the construction of a portion of the work covered by a certain contract dated the day of, 19.., and a supplementary contract dated the day of, 19.., between the late firm of and the of, more particularly described in said contract between said and and said; that it was further provided in said writing obligatory that if the said and should in all respects well and truly keep and perform the said contract on their part in accordance with the terms thereof and of the plans, specifications and profiles therein referred to in the time and in the manner therein described, and should do and perform each and every of the covenants in said contract contained, then said obligation to be null and void, otherwise to remain in full force and effect, and that it was expressly understood and agreed that the said sum of dollars should be the agreed and liquidated damages for the breach of said bond and not in the nature of a penalty; and that said writing obligatory, signed by said defendants and so sealed with their seals, the defendants then and there delivered to the said: which said writing obligatory is now to the court here shown. Yet, the said defendants did not keep and perform the obligations of their said writing obligatory, but therein wholly failed and made default; and by way of assignment and breach of the conditions of said writing obligatory the plaintiff says that the said and, on the day of, 19.., entered into a certain written contract, signed by the said and and sealed with their seals, which is the same contract referred to in said writing obligatory, which contract was in the words and figures following: (Set out contract).

That the said and did not keep and perform the said contract in accordance with the terms thereof, and did not perform each and every month the full monthly pro rata part of the work agreed to be performed according to the terms of said contract, and did not keep upon said work a sufficient number of men or machinery to complete the proper pro rata of the work for each month according to the terms of said contract, and failed to perform such pro rata portion of said work of each month during the term of said contract as would complete the same by the

day of, 19., as therein required, and did not perform said work nor the pro rata share thereof to the satisfaction of the chief engineer of the of, and did not make progress upon said work during said time to the satisfaction of the chief engineer of the of That before the day of, 19., the chief engineer of said of decided that said and had not made sufficient progress upon said work as required by the terms of said contract, and that they, the said and, had not performed in each month before that time the pro rata share of said work required to complete the same by the time in said contract required, and did not keep sufficient men and machinery upon said work to complete the same and to perform the pro rata share of the same each month as required by said contract; that on the day of, 19., the plaintiff took possession of said work and afterwards completed and performed the same as he lawfully might according to the terms of the contract between the of and the firm of; and that the plaintiff, in and about the performance and completion of said work, expended a large sum of money, to wit, dollars in excess of the amount agreed by the plaintiff to be paid to the said and for the performance of said work.

And afterwards said and filed their certain bill of complaint in the court of county on the chancery side thereof and made the plaintiff and one defendants thereto; that in said bill the said, among other things, set forth the said agreement of date,, 19., between, surviving partner of the firm of, and the said, and alleged the execution of the same, and that said, under the firm name of, under the terms of said contract of, 19., entered upon the performance of the same and commenced and prosecuted work thereon and provided tools, machinery and appliances for use upon said work; that it was provided by said contract that in case the engineer of said should be of opinion that the work contracted for under said contract by said was not being carried out by a sufficient force of men, then said should have the right to notify said of such decision of said engineer and said should be entitled to such a notice, and after being so notified said should increase their men or force of men and machinery so as to complete the proper pro rata share of the work for each month; that upon their failure so to do, said might enter upon and take possession of the work, and of the machinery; and that the said,

the plaintiff herein, on the day of, 19.., without having notified said or either of them, as required by said contract that they were in default in the performance of the same and after they had accumulated an amount of material upon the ground and while they were engaged in performing the work required to be done under said contract, took possession of all their machinery and tools and has ever since kept possession of the same. Said bill prayed, among other things, that the defendant,, be required to answer unto said bill, and that said, the plaintiff herein, might render an account and be required to pay to said whatever amount might be found due to them by reason of the taking possession of the said contract by said, and the taking of the tools and machinery.

And afterwards the plaintiff herein filed his certain answer to said bill of said, and his certain cross-bill in said cause. By said cross-bill, this plaintiff alleged, among other things, that on the day of, 19.., cross-complainant and, copartners, as, entered into a contract with the of for the performance of certain work of said according to the terms and conditions therein provided, which contract was filed with said cross-bill as exhibit "A" and made a part thereof; that afterwards departed this life and said became the sole proprietor of said work and entered upon the performance of the same under the terms of said contract; that on the day of, 19.., and, partners as, entered into a contract with him bearing date the day of, 19.., and that on the same date, to secure the performance of said contract of, 19.., said and, as principals, and and, as sureties, executed their certain writing, sealed with their seals, conditioned for the faithful performance of their contract by said, which said last mentioned contract and writing or bond were also made a part of said cross-bill as exhibits "B" and "C" thereto; that said entered upon the performance of said contract of and did not provide a sufficient force of men and sufficient equipment to enable them to make such progress with said work as was required by the terms and conditions of said contract and the contract of said with the, but on the contrary they failed to give proper attention to the work and at times wholly neglected the same and failed to provide a sufficient force of men and sufficient machinery and equipment to insure the progress of the work from time to time as required by said contract; that said chief engineer of the de-

cided at several times that the work performed by said did not comply with the terms of said contract and did not comply with the terms of the contract of said with said; that said made repeated demands, some in writing and some verbal, upon said for the more expeditious performance of said work, but that they wholly failed to comply with said demands from until; that on or about said were in default in the performance of their contract and were so far behind in the work upon the same as to render it impossible to complete the work with the force of men and the equipment then possessed within the time required by said contract of, and the contract between and; that by reason of said non-performance said was in default in the performance of his work with the; that upon taking possession of said work the plaintiff prepared a written notice to and, sureties upon the bond of, and upon the day of, 19.., caused copies of the said notice to be served upon said and by delivering a true copy to each of them personally, notifying them that said had made default in said work; that and failed to comply with the request contained in said notice and and did no further work upon said contract after, 19.., but wholly abandoned and neglected the same; that neither said nor thereafter offered to repossess themselves of said work; that on the day of, 19.., said took possession of said work; that there were upon the ground engines, tracks, material and tools of various kinds necessary for the conducting of said work, which had been used therein by said up to the day of, 19.., and that said made reasonable use of the same in the completion of said work and completed said contract to the satisfaction of the of, under said contract; that by reason of the default and failure of said under said contract of, said cross-complainant was put to great expense in the performance of said work and kept an account of the cost of performing said work, and did said work in an economical and careful manner, and was put to great cost and damage to the extent of dollars and cents; and that said and were liable to pay said amount under the conditions and obligations of their said bond. Said cross-bill further alleged the making of another certain contract of date, 19.., between said cross-complainant and for work other and different than that mentioned in said contract of, 19.. The prayer of said

cross-bill was that an account might be had and taken under said contract of, and that the amount of work upon said contract which said failed to perform might be ascertained; that the actual cost of performing the last named work by the cross-complainant might be ascertained; that the amount of damages which the said cross-complainant had sustained by reason of the failure to perform said contract might be stated, and that an accounting be had upon a certain other contract mentioned in the original bill of complaint of date Said cross-bill made defendants thereto and prayed that they be duly summoned and required to answer said cross-bill, but not under oath; that upon the final hearing said may be decreed to pay to cross-complainant whatever damages he had sustained by reason of the failure of the said to perform said contract of; and that said might pay certain damages under a certain other contract.

And thereupon process or summons, as prayed in said cross-bill, was duly issued in said cause and served upon said and And afterwards said duly appeared in said cause by their respective solicitors and filed their demurrer to said cross-bill; and such proceedings were had therein that said cross-bill was dismissed as to said

And afterwards said filed their answer to said cross-bill, admitting the execution of said contract of, 19.., and that they entered into the performance of the same, and denying certain allegations in said cross-bill and that they were in default on the day of, 19.., with the performance of their work under said contract of, as in said cross-bill alleged; and denying that the cross-complainant notified them of their default under said contract and that they abandoned and neglected said work at any time; and neither admitting nor denying that the cross-complainant performed said work to the satisfaction of the of; and denying expressly that said cross-complainant had sustained damages by reason of their default under said contract of

And afterwards such proceedings were had in said case upon the hearing thereof that a decree was rendered therein by the court of county, finding the equities in said cause were with the said, except as to the (State matter of exception), and that the said was entitled to the relief prayed in his cross-bill, and finding the facts alleged in said cross-bill to be substantially true, and that said and failed to keep and perform the terms of said contract of and failed to keep upon said work a sufficient

force of men and machinery to complete the monthly pro rata of the same according to the terms of said contract, and failed to perform the monthly pro rata of the same according to the terms of said contract; and that the chief engineer of the of rightfully decided and determined that said and had made default in the terms of said contract and had failed to keep a sufficient force of men and machinery on said work to perform the monthly pro rata therein, and had failed to perform the monthly pro rata of the same; and that said might lawfully take possession of said contract according to its terms and conditions. And that on the day of, 19.., on behalf of, consented and agreed that said might enter upon and take possession of said work; and that on said date entered upon said work and took possession of the same and afterwards completed the same to the satisfaction of the of; and that in the performance of the work agreed to be done by said, said paid out large sums of money which exceeded the amount by him agreed to be paid said; and it was adjudged and decreed by the court that the cause be referred to the in chancery to state an account; and the bill of complaint of said was dismissed; and said account was ordered to be taken of the balance of the transactions under the two several contracts, one of date, 19.., being the same one referred to in the writing obligatory herein, and one of date, 19.. And afterwards the master in chancery of county under said decree stated an account between said, plaintiff, and, finding that the plaintiff herein had sustained damages by reason of the non-performance by said of said contract of, in the sum of dollars, which report was approved by the court of county and a decree was thereupon rendered in favor of the plaintiff and against said for the sum of dollars and cents; and that said decree still remains in full force and not reversed, appealed from or set aside.

Whereby an action hath accrued to the plaintiff to have and recover of and from the defendants the sum of dollars above demanded; to the damage of the plaintiff of dollars; wherefore he brings suit, etc.

(Mississippi)

For that whereas, defendants, on, to wit, the day of, 19.., by their writing obligatory bearing date of that day, jointly and severally acknowledged themselves to be held and firmly bound unto the plaintiff in

the sum of dollars, to be paid the plaintiff, but which said writing obligatory was and is subject to a certain condition therein written: a copy of said writing obligatory is herewith filed, marked exhibit "A" and made a part of this declaration, as much as if written therein.

That the nature and condition of the bond, or writing obligatory aforesaid, was given and made payable to, the plaintiff, by defendant for the faithful performance of a certain contract made and entered into on the day of, 19..; a copy of said contract is hereto attached, marked exhibit "B," and made a part of this declaration, as much as if written therein.

That the contract upon which this action is founded was carried out fully and completely by the plaintiff, and that he has complied with all and singular the conditions and stipulations on his part required by the contract.

That the said, one of the parties to the said contract, failed and refused and still fails and refuses to carry out his part of said contract; that the said plaintiff herein has made repeated demands upon the said to carry out and to perform the contract as written, and has also informed the other two of the defendants herein,, and requested that they perform the contract for which the bond was executed.

That the said failure on the part of the defendants under the terms and conditions of said contract and the bond given by the said contractor and signed as sureties by, two of the defendants herein, caused the supervising architect not to accept the contract as written, and that said supervising architect was forced to complete the contract at the instance of the plaintiff herein at a cost of dollars.

Yet, the defendants, although often requested, have not paid the said sum of dollars, the amount expended by the plaintiff herein in completing the work and labor and paying for the material, for which the said should have paid, or any part thereof, but wholly failed and refused to do the work, pay for the material or complete the contract as written, or any part thereof; and that by virtue of said refusal to complete the contract, as per stipulation therein, the plaintiff has been damaged in the sum of dollars.

1732 Contractor's bond, mechanics' liens, Narr. (Va.)

For this, to wit, that heretofore, to wit, on the day of, 19.., the said defendants by their certain writing obligatory, sealed with their seals and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said plaintiff in the said sum of \$...... above

demand to be paid to the said plaintiff. Which said writing obligatory was and is subject to a certain condition thereunder written whereby, after reciting to the effect following, to wit: That the corporation has agreed to loan to the corporation the sum of dollars (\$.....), evidenced by bonds of one dollars (\$.....) each, payable one year after date and dated the day of, 19.., and bearing interest from date at the rate of per cent per annum, payable semi-annually, the interest being evidenced by coupons attached to said bonds, all of the said bonds and interest to be secured by a deed of trust upon the property of the corporation, situated on the (Insert legal description), more or less, and that one of the conditions of the said loan from the corporation to the said corporation is that a building will be erected on said property by the corporation, and completed on or before the day of, 19.., at a cost of not less than \$..... and in substantial compliance with the plans and specifications of, under which the same is being erected, and shall be free from all material, labor and mechanics' liens, it was conditioned that if the building as above described should be erected and completed by the corporation at a cost of about \$..... on or before the day of, 19.., and should be free from all material, labor and mechanics' liens, then said obligation should be void, otherwise to remain in full force and virtue.

And the plaintiff in fact sayeth that before said writing obligatory was given to it, it agreed with the defendant, the corporation, to loan it the sum of \$..... as set forth in said writing obligatory, provided said writing obligatory was given to it, the plaintiff by said defendant, except that there were terms and conditions affecting the said loan not set forth in said writing obligatory, but which were in the agreement between the plaintiff and the defendant, the corporation, for the said loan of \$....., which said terms and conditions were that the corporation should pay the plaintiff two per cent, or the sum of \$..... commission for making the loan; that as it was stated in the application of the corporation for said loan that the stockholders' meeting of the corporation authorizing the said bond issue would not be held until, 19.., and that it was necessary that the corporation should have at least \$..... immediately on account of construction, the corporation was to advance to the corporation the said sum of \$..... on delivery of the note hereinafter mentioned and accept the corporation's note dated, 19.., and due

19., in favor of and endorsed by, and also that the corporation should turn over to the corporation a sinking fund of \$....., to be held by it for the maturity of the loan, said sinking fund to be payable as follows: of which \$..... was to be payable not later than, 19.; \$..... not later than, 19.; and \$..... not later than, 19.; of all of which terms and conditions the defendant, the company, had knowledge and notice before the execution and delivery by it of the said bond.

And the plaintiff further sayeth that, pursuant to said promise, and because of the giving of said writing obligatory by the said defendants as aforesaid, it did loan on a certain day thereafter, to wit, the day of, 19., to the defendant, the corporation, the sum of \$..... on the terms and conditions as set forth above, of all of which terms and conditions the company had knowledge and notice as aforesaid, which said loan was evidenced by bonds of \$..... each, payable one year after date and dated the day of, 19., and bearing interest from date at the rate of six per centum, per annum, and payable semi-annually, the interest being evidenced by coupons attached to said bonds; and the plaintiff further sayeth that said loan was made as aforesaid in accordance with the terms and conditions as set forth above, and of all of which the said company had knowledge and notice as aforesaid, and because said writing obligatory has been given by the defendants to the plaintiff. And the plaintiff further sayeth that said bonds and interest were secured by a deed of trust, duly of record in the clerk's office of the corporation court of the city of, on a certain date, to wit, on the day of, 19., from the said defendant corporation on the property described in said writing obligatory, and in accordance with the terms and conditions as set forth above, and of all of which the said company had knowledge and notice as aforesaid, and because of the giving of said writing obligatory by the defendants to the plaintiff.

And the said plaintiff further says that contrary to the terms of said writing obligatory the said building was not erected and completed on the day of, 19., as required by said writing obligatory, free from material, labor and mechanics' liens, and that it was subject at the time of its completion to material, labor and mechanics' liens for labor and material entering into the erection and construction thereof contrary to the undertaking of the defendants as set forth in said writing obligatory; and that said

writing obligatory and said loan and the said deed of trust securing the same were made after the work of constructing said building had commenced and that said material, labor and mechanics' liens for material and labor entering into the construction of said building were prior liens to the lien of said deed of trust securing said loan of \$.; and the plaintiff further sayeth that at the time the building was completed, to wit, on or about the day of, 19.., and within sixty days thereafter, as provided by the statute, various claims of labor, material and mechanics' liens were filed in accordance with the statute in such cases made and provided, for labor and material which had entered into the construction and erection of said building, and that thereafter on a certain date, to wit, on the day of, 19.., the said building, together with the land upon which the same had been erected and which is described as set out in said writing obligatory, was adjudicated to be subject to certain material, labor and mechanics' liens for labor and material entering into the construction and erection of said building by this honorable court acting on the chancery side in the case of v. corporation, et als., to the extent of \$., principal and interest to, 19... And the plaintiff sayeth that said suit was a suit brought to enforce mechanics' liens against said property and that said property is situated in the city of and that this court had jurisdiction of said suit. And the plaintiff further sayeth that said liens were adjudicated by this court in the case aforesaid, to be liens for labor and material entering into the construction and erection of said building and that the same were prior liens on said building and the land on which it was erected to the lien of the deed of trust hereinbefore mentioned, securing the \$. loan made by the plaintiff to the defendant corporation as hereinbefore set out, because said loan was made after the work of constructing said building had commenced.

And the plaintiff further sayeth that the said defendant had notice of said material, labor and mechanics' liens and was called upon by the plaintiff to pay the same and prevent a sale of said property; and the plaintiff further sayeth that in consequence of said material, labor and mechanics' liens and in consequence of said failure of said defendants to pay the same as they were in duty bound to do, the said building and the land on which it was erected, described as aforesaid, was sold at public auction on a certain day, to wit, on the day of, 19.., to the highest bidder for the sum of \$. under a decree of this honorable court in the case aforesaid; and on a certain day, to wit, on the day of, 19.., and on the day of, 19.., after paying the costs of said suit, amounting

to a certain sum, to wit, \$. and after paying also taxes and insurance, the sum of \$., including interest, was paid out of said fund of \$. to the holders of said material, labor and mechanics' liens, and the plaintiff received under said decree from the sale of said property under the said decree of said court on account of the said \$. of bonds owned by it, and representing the loan made by it as aforesaid and on account of interest which had accrued thereon, only the sum of \$., and the balance due on the said bonds and on the interest which had accrued thereon since the date thereof remains unpaid, except \$. paid on account of interest on the day of, 19.., and except \$., paid as a sinking fund. By reason of which said breach, the said writing obligatory became and was forfeited and thereby an action has accrued to the said plaintiff to demand and have of the said defendants the said sum of \$. above demanded.

Yet, the said defendants, although often requested, have not as yet paid the said sum of money above demanded or any part thereof to the said plaintiff, but have hitherto wholly neglected and refused and still do neglect and refuse so to do, to the damage of said plaintiff of dollars, and therefore it brings this suit.

1733 Court clerk's bond, action

The taking of a nonresident as surety upon an appeal bond and approving it renders the clerk liable to an action upon his official bond, the determination of the sufficiency of the security being ministerial.²⁴

1734 Cutting timber, parties

The owner of the fee simple alone is the person to maintain an action of debt for the recovery of the statutory penalty for cutting timber.²⁵ All the fee owners of the land upon which timber is cut must join in an action of debt for the recovery of the penalty.²⁶

1735 Cutting timber, declaration requisites

In an action to recover penalties under the statute for cutting timber the declaration must allege that the plaintiff is seized

²⁴ *People v. May*, 251 Ill. 54, 56 (1911).

²⁶ *Edwards v. Hill*, 11 Ill. 22, 24 (1849).

²⁵ *Jarrot v. Vaughn*, 2 Gilm. 132, 138 (1845); Sec. 2, c. 136, Hurd's Stat. 1909, p. 2218.

in fee of the land on which the trees were cut;²⁷ and this is an essential averment of the cause of action.²⁸

1736 Detinue bond, Narr. (West Virginia)

For this, to wit, that heretofore, to wit, on the day of, 19.., the said defendants, by their certain writing obligatory, the date whereof is the day and year last afore-said, sealed with their seals, an attested copy of which is now to the court here shown, the original of said writing obligatory being filed in the clerk's office of the circuit court of county, West Virginia, acknowledged themselves to be held and firmly bound unto the plaintiffs, described in said writing obligatory as and, in the sum of dollars, to be paid to the said plaintiffs, therein described as and; to which said writing obligatory there was and is annexed a condition, to the effect that the said, described therein as, and had commenced an action of detinue in the circuit court of county, West Virginia, against the plaintiffs, and, described therein as and, for the recovery of certain sawed lumber in the form of cross ties and sawed lumber, of the value of dollars; that the said and, desiring the immediate possession of said property, had filed the affidavit of the said before the clerk of the said circuit court, as provided by law, so as to obtain an order directing the sheriff of county to seize and take into his possession the property mentioned in the summons in said action of detinue, and to turn the same over to the plaintiffs in said action of detinue, the said and; and that if the said and should pay all costs and damages which might be awarded against them, or sustained by any person by reason of such suit, and should have the said property so claimed by them forthcoming to answer any judgment, or the order of said circuit court, respecting the same made at any time during the pendency of the action, then said writing obligatory was to be void, otherwise to remain in full force. And the said plaintiffs aver, that after the making, and the approval by said clerk, of the said writing obligatory, to wit, on the day of 19.., the said clerk issued an order, directed to the sheriff of the said county of reciting the pendency of the said action of detinue for the recovery by the plaintiffs in said action, to wit, the said

²⁷ Edwards v. Hill, *supra*.

²⁸ Wright v. Bennett, 3 Scam. 259 (1841); Jarrot v. Vaughn, 2 Gilm.

132; Edwards v. Hill, 11 Ill. 23; Sec. 2, c. 136, Hurd's Stat. 1909, p. 2218.

..... and, from the defendants therein, to wit, the said and, the latter therein described as, of feet of sawed lumber, in the form of cross ties and sawed lumber, or the value of \$.; and further reciting the filing of the above mentioned affidavit as also the above mentioned writing obligatory, and then continuing as follows, "you" (meaning thereby the sheriff of county) "are hereby ordered in the name of the state of West Virginia to seize and take into your possession the said sawed lumber and cross ties now on sticks at in said county," (meaning thereby the cross ties and sawed lumber mentioned in the summons in said action).

And the said plaintiffs further aver, that after the making and approval of said writing obligatory, and after the issuing by said clerk of the said order, directed, as aforesaid, to the sheriff of county, and after the delivery of the said order by the said clerk to the said sheriff, to wit, on the day of, 19.., the said sheriff seized and took into his possession certain personal property of the plaintiffs, and, to wit, the cross ties and sawed lumber of plaintiffs on in said county of being the same cross ties and lumber mentioned in the said order as also in the declaration filed in said action of detinue and referred to in the affidavit and writing obligatory above mentioned; that said seizure and taking possession by said sheriff was done under color of and pursuant to the said order issued by said clerk in said action of detinue as aforesaid; that the said sheriff at the instance, request and by the consent of the said and and as the representative of the said and retained and withheld from the plaintiffs the possession of said sawed lumber and cross ties and kept the same until the day of, 19.., and thereupon, before the circuit court of county, aforesaid, (to the clerk's office of which court the said sheriff returned said order requiring him to seize and take into his possession the sawed lumber and cross ties, as aforesaid), defense was made in the said action of detinue that the defendants therein, the said and, did not detain the property, timber, goods and chattels in the declaration in said action specified, meaning thereby the sawed lumber and cross ties, seized as aforesaid, or any or either of them, or any part thereof, in manner and form as the said plaintiffs in said action, the said and, thereof complained against them, the said defendants in said action of detinue.

Whereupon such proceedings were had in such action of detinue that thereafter, to wit, on the day of, 19.., judgment was entered by the circuit court of county, state aforesaid, upon the said defense, for the said

..... and against the said and that the said action of detinue be dismissed, and that the plaintiffs therein, the said and, pay to the said defendants therein the said and their, the said and costs of suit therein expended, including an attorney's fee of dollars, and the further sum of dollars fine; and plaintiffs aver that the proper costs of plaintiffs, and, incident to said action of detinue, as taxed by said clerk including said attorney's fee of dollars, and the said fine of dollars, amounts to the sum of \$.; and thereupon on the entering of the said judgment of the said court (which said court adjourned for the term thereof, being the regular, 19.., term thereof, on the day of, 19..), the possession of the said sawed lumber and cross ties seized as aforesaid by the said sheriff, was restored to the plaintiffs, and plaintiffs took possession thereof.

And plaintiffs further aver that the sawed lumber and cross ties seized as aforesaid by said sheriff, aggregated a much larger number of feet board measure, than was recited in said declaration, affidavit and order issued in said action of detinue as aforesaid; that the actual number of feet, board measure, of said sawed lumber and cross ties, seized as aforesaid aggregated a large amount, to wit, feet, board measure; and plaintiffs further aver that at and before said seizure the said sawed lumber and cross ties were piled in piles on sticks aggregating a larger number of piles, to wit, piles, to the end that the same might dry out and thoroughly season before shipment; that at the time said lumber was seized as aforesaid, to wit, on the day of, 19.., the same was ready for market, and plaintiffs had made preparations to haul and deliver the same at the shipping point on the railroad, a distance of about miles from said lumber yard; and had repaired, constructed and put in good condition for hauling a good road bed down and along for said purpose, at a large expense, to wit, \$.; that on account of the seizure and detention of said sawed lumber and cross ties by the said sheriff as aforesaid under and pursuant to the order entered in said action of detinue, plaintiffs were greatly injured and damaged in this; that during the time that said sawed lumber and cross ties were in the possession of the said sheriff as aforesaid, that is to say, between the day of, 19.., and the day of, 19.., the water in was permitted to over run and submerge a portion of said piles of said cross ties and sawed lumber, to wit, piles doing great injury to a large part of the same, to wit, feet board measure; that the depreciation in value of the sawed lumber and cross ties over run and submerged as afore-

said by reason of such overflow aggregated a large sum to wit, \$..... per thousand feet, board measure; that during said period of detention by said sheriff of said sawed lumber and cross ties, a large part thereof, to wit, feet, board measure, deteriorated in value a large amount, to wit, \$..... per thousand feet by reason of the decay and depreciation in quality due to the weather and exposure to the elements; that plaintiffs were further injured and damaged by the seizure and detention of said sawed lumber and cross ties from the day of, 19.., until the day of, 19.., by the said sheriff as aforesaid, in this; that during the said period the said road repaired, constructed and put in good condition for hauling, as aforesaid, by the plaintiffs for the purpose of hauling out said lumber and cross ties and delivering the same to the railroad, at the place of shipment, at the mouth of, that being the nearest and most convenient point on the railroad for shipment of said lumber and ties, was washed out and destroyed, and plaintiffs were compelled to reconstruct said road at a great expense, to wit, \$..... before the said lumber and ties could be marketed; that there was no other suitable place from which to ship said lumber and ties, and the expenditure of said sum of \$..... in the reconstruction of said road down and along said, as aforesaid, was made necessary by the seizure and detention of said sawed lumber and ties as aforesaid; that the seizure, and detention of said sawed lumber and cross ties by the said sheriff, as aforesaid, prevented plaintiffs from hauling and delivering the said lumber and ties to the railroad at the mouth of when the weather was good, and the said road firm and dry, and the plaintiffs will be compelled to haul and deliver the said lumber and ties to said railroad in the fall and winter months of the year when the roads are wet and bad; that the increased cost and expense incident thereto will aggregate a large sum, to wit, \$..... per thousand feet, board measure; that on account of the said action of detinue and the seizure and detention, as aforesaid, of plaintiffs said sawed lumber and cross ties, plaintiffs and their wagons, teams and employees were left idle and were compelled to lose and did lose a great deal of time, to wit, days to the great loss to plaintiffs, to wit, \$.....; that plaintiffs were also put to great expense for traveling expenses and board bills and were compelled to lose and did lose, by reason of the pendency of said action of detinue, a large number of days in attending said circuit court at the trial of said action, to wit, days, to the great damage to plaintiffs, to wit, \$.....; that by reason of the institution of said action of detinue and the seizure and detention of said sawed lumber and ties, as aforesaid, plaintiffs were compelled to lay out and expend large

sums of money in the employment of counsel to represent and defend them, the said defendants, in said action of detinue, which said sums aggregated a large amount, to wit, \$.....; and plaintiffs further say that the market price of sawed lumber and cross ties depreciated in value during the detention of said lumber and ties by the said sheriff as aforesaid; and plaintiffs will be compelled to sell certain grades of said sawed lumber and said cross ties at a greatly decreased price under that which plaintiffs could have received for said sawed lumber and cross ties at the time of said seizure by the said sheriff as aforesaid; that the depreciation of the market price per tie for said cross ties will aggregate a large amount, to wit, cents per tie; that the total number of cross ties seized and detained by the sheriff as aforesaid aggregated a large number, to wit, ties and the total depreciation in the market price of said lot of cross ties will thus aggregate a large sum, to wit, \$.....; that the market price of sawed lumber depreciated during the period of such detention a large amount, to wit, \$..... per thousand feet, and plaintiffs will be compelled to sell sawed lumber, exclusive of said cross ties, at a greatly depreciated price; that the loss to plaintiffs incident to such depreciation in the market price will aggregate a large sum on said sawed lumber, exclusive of said cross ties, to wit, a loss of \$.....; all of which costs, expenses and damages were sustained by the plaintiffs by reason of said suit and action of detinue.

And the plaintiffs say that no part of said costs and damages incurred and sustained by plaintiffs as aforesaid has been paid by the said and, or by either of them, or by any one else for them, or either of them, to the plaintiffs or either of them, although they, the said and have been requested to pay the same. And so these plaintiffs aver that the condition of the said writing obligatory has been broken, and that by reason of said breaches the said writing obligatory has been forfeited; whereby an action hath accrued to the said plaintiffs to have and demand of and from the defendants herein the sum of dollars first above demanded.

Yet, the said defendants, etc.

1737 Discrimination in insurance rates, action

A life insurance company is liable under the statute if it assumes an insurance risk primarily upon the condition that the insured shall have an option to purchase its capital stock.²⁹

²⁹ *People v. Commercial Life Ins. Co.*, 247 Ill. 92 (1910); Laws 1891, p. 148.

1738 Discrimination in insurance rates, declaration requisites

After stating all of the facts which show specifically a violation of the statute against discrimination in rates by life insurance companies, it is not necessary to denounce the discrimination as unjust.³⁰

1739 Game law, action

Resident and nonresident stockholders in a shooting club which owns the grounds upon which shooting is done are liable to an action for the violation of the game law of 1903.³¹

1740 Gaming, action

An action of debt lies to recover money, goods, or other valuable things lost, paid or delivered to winners at gaming.³²

1741 Indemnity bond, Narr. (District of Columbia)

For that heretofore, to wit, on the day of, 19.., the said plaintiff procured from the defendant for its protection and indemnity a certain writing obligatory, signed by its president and attested by its resident and sealed with its corporate seal as required by law, a counterpart thereof is now to the court herein shown, the date whereof is the day and year aforesaid, whereby the said defendant, because of certain considerations thereunto moving, as fully stated in the copy of the bond hereto attached, and made a part hereof, undertook, contracted and agreed to and with the plaintiff that he would make good and reimburse the plaintiff such pecuniary loss of money, securities or other personal property, not exceeding the sum of dollars which might result to plaintiff by reason of the appointment and employment by plaintiff of late of as its through or by reason of his fraud or dishonesty in the performance of his duties as such.

That after the execution, sealing and delivery by defendant to plaintiff of said bond and writing obligatory aforesaid, and after the date of its becoming effective against the defendant, and in favor of the plaintiff, the said, as, having in his possession and custody certain funds of and belonging to the plaintiff, to wit, the sum of dollars for careful and safe keeping thereof, did wrongfully, un-

³⁰ People v. Hartford Life Ins. Co., 252 Ill. 398, 402 (1911).

³¹ Cummings v. People, 211 Ill.

392, 402 (1904); Game Law (Laws 1903, p. 215).

³² Sec. 132, Criminal Code (Ill.).

lawfully and fraudulently convert the same to his own use, and did thereby deprive plaintiff of the same, which said sum of money has never been returned, redelivered or repaid to plaintiff by the said, nor by any one for him, although often demanded of him by the plaintiff and its board of directors, as well as of his legal representative, administrator of the defendant herein.

And the plaintiff says that because of the premises aforesaid that the defendant is bound, under its writing obligatory as aforesaid, to make good and reimburse the plaintiff the pecuniary loss herein set out, to wit, the sum of dollars; but the said defendant has failed and refused to pay the said sum of dollars, although often demanded and requested to do so, and has also refused to pay the sum of dollars as provided in its bond and writing obligatory, to the damage of the plaintiff of dollars. Wherefore, etc.

1742 Injunction bond, action

Since the Illinois amendatory act of 1874, immediately upon the dissolution of an injunction a right of action accrues on the injunction bond to the party against whom the injunction was directed for the costs and damages sustained in and about the dissolution of the injunction, irrespective of whether damages have been assessed or whether the case has been finally disposed of.³³ Upon the dissolution of an injunction, the bond, when forfeited, constitutes the cause of action and is intended by law to cover damages of every kind which a party may have sustained by the wrongful issuing of the injunction writ.³⁴ The obligee may institute the action on the bond as soon as the injunction is dissolved without awaiting the outcome of an appeal from the order or decree of dissolution.³⁵ An action on an injunction bond must be brought in the name of both obligees for all the damages sought to be recovered.³⁶

1743 Injunction bond, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., at and within the county of and state of Illinois, in the court, on the chancery side thereof, the said defendant,, having filed his

³³ Shackleford v. Bennett, 237 Ill. 523, 526 (1909).

³⁴ Gorton v. Brown, 27 Ill. 489, 494 (1862).

³⁵ New York National Exchange

Bank v. Reed, 232 Ill. 123, 124 (1908).

³⁶ New York National Exchange Bank v. Reed, *supra*.

bill of complaint against the plaintiffs, praying for discovery and an injunction against them to restrain them from doing certain acts therein mentioned, and having caused the said writ of injunction to issue upon the order of the master in chancery of said court from the office of the clerk of said court, to the sheriff of county, which was served on all of the plaintiffs except, and returned into court; and afterwards, to wit, on the day of, 19.., the said court, upon the motion of the said plaintiffs,, having adjudged the bond filed under the order of the master in chancery, before the issuance of the writ, to be insufficient, required the said defendant to give and file a sufficient bond; afterwards, to wit, on the day of, 19.., at and within the county of aforesaid, the said defendants made their certain other writing obligatory, sealed with their several seals (and now to the court here shown) bearing date on the day of, 19.., and then and there and thereby acknowledged themselves held and firmly bound unto the said plaintiffs, in the sum of dollars, to be paid to the plaintiffs, their executors, administrators or assigns, for which payment well and truly to be made, the defendants bound themselves, jointly and severally, and their respective heirs, executors and administrators firmly by their said writing obligatory, with a certain condition thereunder written as follows, to wit:

Whereas, the above named had filed his bill of complaint in the court against the above named praying, among other things for an injunction to restrain the said defendants therein named, from certain acts and things in the said bill of complaint mentioned; and whereas, the honorable, judge of the said court of said county, had allowed the injunction for that purpose, according to the prayer of said bill, upon the said complaining complainant giving the security required by him in such case. Now, therefore, the condition of the above obligation was such, that if the above bondmen, their heirs, executors or administrators, or any of them, should well and duly pay or cause to be paid to the said their executors, administrators or assigns, all such costs and damages as should be awarded against the said complainant, in case the said injunction should be dissolved, then the above obligation was to be void, otherwise to remain in full force and virtue.

Which said writing obligatory was, on a certain day, to wit, on the day of, 19.., in pursuance of the order of said court, filed in said court, and became and was in full force and effect, for the benefit and security of the plaintiffs; and afterwards such proceedings were had in said cause, in and by the court aforesaid, that on the

day of, 19.., at and during a term of said court, then and there holden, the said injunction was, by the order and decree of said court, dissolved upon the motion of the plaintiffs on the bill and answers of the said; and afterwards, to wit, on the day of, 19.., at and during a term of said court, the said bill of complaint was dismissed at the cost of the complainant therein, aforesaid.

1. And the said plaintiffs aver, that the said were put to great trouble and expense, in employing solicitors and defending against said bill of complaint, and that they, said plaintiffs paid to solicitors, and for costs and expenses in and about the defense of said suit, a large sum of money, to wit, the sum of dollars, which said sum is due and wholly unpaid; and the said defendants have failed and neglected to pay to the plaintiffs, or any of them, or to any person for them, the said sum of money so expended, or any part thereof.

2. And for a further breach the plaintiffs aver, that the said plaintiffs at the time of the suing out and service of said writ of injunction, were doing business as merchants, under the name and style of at in the county of and state of Illinois, and were as such then and there the owners of a stock of merchandise, to wit, of the value of dollars, and were paying for rent of store room and expenses of conducting the business, a large sum of money, to wit, the sum of dollars per month, and as such were then and there doing a profitable business, and realizing as profits therefrom a large sum of money, to wit, the sum of dollars per month, and the said plaintiffs were then and there prohibited by the said writ of injunction from selling or disposing of their goods, or any part thereof, or from transacting any business whatever with reference thereto, whereby the said were then and there compelled and forced by the said writ to lose the profits arising from their said business, and to pay the said expenses, and in so doing they, the said, suffered damages in a large sum of money, to wit, in the sum of dollars, which said sum the said defendants have not paid, or any part thereof.

3. And for a further breach the said plaintiffs aver, that the said by reason of the wrongful suing out of said writ of injunction then and there suffered a large amount of damages, to wit, in the sum of dollars, and that the said defendants have not paid the same, or any part thereof.³⁷

³⁷ Hibbard v. McKindley, 28 Ill. 240, 241 (1862).

1744 Insurance, action

An action of debt is appropriate to recover on a fire insurance policy.³⁹ The proofs of loss are considered as having been duly made according to the conditions of the policy where an insurance company refuses to pay on some other ground than the defect in the preliminary proofs and suggests no defects in the proofs.³⁹

1745 Insurance, declaration requisites

The averment of a total loss is sufficient to cover a partial loss.⁴⁰ It is not indispensable to allege facts constituting a waiver or an excuse for failing to bring suit within the period specified in a policy,⁴¹ but it is permissible to aver such facts.⁴² If the declaration sets up the waiver, the general issue will put the plaintiff upon proof of the waiver, and no special plea is necessary. If no excuse of waiver is averred, and the bar of the suit is set up by plea, the plaintiff may reply facts in avoidance of the bar.⁴³

1746 Intoxication, parties

The widow and children of an intoxicated person have each a separate and independent right of action against the person causing wrongful intoxication.⁴⁴

JUDGMENTS AND DECREES

1747 Common counts

The common money counts in debt are insufficient to support an action on a judgment, but the plaintiff must declare in the usual manner in debt on the judgment.⁴⁵

1748 Foreign decree, alimony, action

An action of debt is maintainable on a foreign decree for alimony.⁴⁶

³⁸ and ³⁹ *Peoria Marine & Fire Ins. Co. v. Whitehill*, 25 Ill. 466 (1861).

⁴⁰ *Peoria Marine & Fire Ins. Co. v. Whitehill*, *supra*.

⁴¹ *Andes Ins. Co. v. Fish*, 71 Ill. 620, 625, 626 (1874) limiting,

⁴² *Peoria Marine & Fire Ins. Co. v. Whitehill*, *supra*.

⁴³ *Illinois Live Stock Ins. Co. v. Baker*, 153 Ill. 240, 241 (1894).

⁴⁴ *Stecher v. People*, 217 Ill. 348, 350, 351 (1905); Sec. 9, Dram-shop act (Hurd's Stat. 1911, p. 956).

⁴⁵ *Runnamker v. Cordray*, 54 Ill. 303, 305 (1870).

⁴⁶ *Britton v. Chamberlain*, 234 Ill. 246, 249 (1908).

1749 Foreign judgment, declaration requisites

In an action of debt upon a judgment of a foreign state rendered by a court of general jurisdiction, it is not necessary to aver that the court had jurisdiction of the person of the defendant, it being sufficient to aver that, by the consideration of the court, a judgment was rendered against the defendant.⁴⁷

1750 Foreign judgment, Narr. (Ill.)

For that whereas, the plaintiff, at the term, in the year 19.., of the court of the county of, in the state of, to wit, on the day of, in the same year, by the consideration and judgment of the same court, recovered against the defendant in a certain action, the sum of dollars, damages whereof the defendant was convicted, as by the record thereof remaining in the same court more fully appears; which said judgment still remains in full force; yet the defendant has not paid to the plaintiff the said sums of money so by him recovered as aforesaid, together amounting to the sum of dollars, or any part thereof, but refuses so to do, to the damage of the plaintiff in the sum of dollars; and therefore he brings suit.⁴⁸

1751 Lease, Narr. (Ill.)

For that whereas, the said plaintiff, heretofore, to wit, on the day of, 19.., at, to wit, the county aforesaid, demised by written lease to the said defendant a certain messuage and premises with the appurtenances, to have and to hold the same for a certain term of years, to wit, one part of said premises from the day of, 19.., up to the day of, 19.., and another part thereof from the day of, 19.., to the day of, 19.., yielding and paying for said messuage and premises the yearly rent of dollars, from and after the day of, 19.., payable in advance on the day of then next ensuing, until the completion of the said term, said rent or any part thereof bearing interest at the rate of per centum per annum from due until paid; by virtue of which said demise said defendant entered the said premises and was possessed thereof from thence hitherto, when a large sum of money, to wit, the sum of dollars of the rent

⁴⁷ *Rae v. Hulbert*, 17 Ill. 572, 577 (1856).

⁴⁸ Add copy of instrument sued on

and attach certified copy of judgment and also clerk's and judge's certificate of magistacy.

aforesaid, became and was due and payable from said defendant to said plaintiff, and still is in arrear and unpaid to the said plaintiff, whereby an action has accrued to the said plaintiff to demand and have the said sum of dollars above demanded; yet the said defendant has not as yet paid the said sum of dollars above demanded, or any part thereof, although often requested so to do, but has refused and still refuses, to the damage, etc.⁴⁹

1752 Liquor dealers' bond, Narr. (West Virginia)

For this, to wit, that heretofore, to wit, on the day of, 19.., the said defendants, by their certain writing obligatory, sealed with their seals, a copy of which duly certified by, he being the officer in whose office it is required by law that said writing should be filed and to the court now here shown, filed herewith, marked as exhibit "Bond," the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the town of in the sum of dollars above demanded, to be paid to the said plaintiff; to which writing obligatory a condition was and is annexed to the effect following, to wit: (Set forth condition verbatim).

And the said plaintiff in fact saith that the said instituted an action in the circuit court of county, West Virginia, against and, partners doing business as, the object of which suit was to recover damages against the said and, partners doing business as, under the provisions of section 26 of chapter 32 of the Code of West Virginia, as amended, and more particularly described as follows, to wit: That the said was, on the day of, 19.., the lawful wife of, and had been his lawful wife for a long time prior thereto, to wit, for more than years, and was still the lawful wife of the said, at the time of the institution of said suit, which plaintiff alleged was the day of, 19.., and that prior to the day and year last aforesaid, the said had become addicted to drinking intoxicating liquors to excess, and on said last named day and theretofore the said had formed and acquired the habit of drinking to intoxication and was in such habit on said day; that on the day of, 19.., and for some time prior thereto, the said and partners doing business as were engaged in the business of selling intoxicating liquors, in the town of, in said county and were at the time of the

⁴⁹ Miller v. Blow, 68 Ill. 304, 310 (1873).

institution of said suit engaged in such business, having a state license so to do, and that in order to obtain said license they entered into the bond mentioned herein, and that said had been engaged in such business for some time prior to that day, having all that time such license therefor; that on or about the day of, 19.., the said, while having the state license aforesaid, began to furnish and sell to the said, and when and while the said was in the habit of drinking to intoxication, intoxicating liquors such as whiskey, brandy, ale, beer and other drinks of like nature, and continued to furnish and sell said such drinks since the said last mentioned day on divers times and occasions, and also while said was so in the habit of drinking such liquors to intoxication, and in fact on divers times and occasions ever since the day of, 19... And that at the time aforesaid when the said so furnished the said intoxicating liquors as aforesaid, and while the said was so in the habit of drinking to intoxication, the said and, had reason to believe or know, that the said was in the habit of drinking to intoxication, and that while the said was in the habit of drinking to intoxication, and after the said and had reason to believe that said was in such habit, and while the said and were so engaged in the business of selling intoxicating liquors, in the town and county aforesaid, and on divers times during all the period aforesaid preceding the institution of the said suit, the said and, partners doing business as, furnished and sold to the said intoxicating liquors. Whereby and in consequence of the said and so furnishing said intoxicating liquors to the said, during the period and at the various times mentioned in the declaration of said suit, the said became and was intoxicated by reason of the said defendants in said action so furnishing and selling him intoxicating liquors, as hereinbefore stated, the said neglected his work and squandered his money, failed to attend to his business, spent his money on games of chance, kept and maintained by the said defendants, and, partners doing business as, became sick and incapacitated for work at his trade of, caused wholly or in part, by the unlawful furnishing or selling intoxicating liquors to him, the said, by the said and, as stated herein, and that by reason of the said premises the said was greatly injured in her means of support and sustained damages in a large sum, to wit, in the sum of dollars.

And plaintiff here avers that the object of the said suit

instituted as aforesaid by the said against and, partners doing business as, was to recover the damages sustained by her in her means of support as hereinbefore set out, as she was entitled to do under the provisions of chapter 32 of the Code of West Virginia, as amended.

And plaintiff avers that on the day of, 19..., an order was entered in the said action instituted by the said in the circuit court of county, West Virginia, against the said and, partners doing business as, in which order the said circuit court of county, West Virginia, that being the court in which the said action was pending, entered judgment in favor of the said against and, partners doing business as, for the sum of dollars with legal interest thereon until paid, and her costs about the prosecution of her suit expended, which said order made and entered by the circuit court of county, West Virginia, on the said day of, 19..., in the said action instituted as aforesaid by the said against the said and, partners doing business as, is in words and figures as follows, to wit: (Set out judgment, including caption).

And plaintiff avers that after said judgment was entered by said court as aforesaid, the said caused a writ of *fiery facias* to be issued by the clerk of the said circuit court, upon said judgment and which was directed to the sheriff of county, West Virginia, and placed in his hands to be executed, which was returned by said sheriff with the endorsement thereon "No property found."

Nevertheless, the said, although well knowing the premises, and although by the said often requested, to wit, on the day of, 19..., and on divers other times the amount of the judgment aforesaid, and costs aforesaid, or any part thereof, hath not paid and satisfied to the said, according to law, but hath hitherto wholly neglected and refused, and still doth neglect and refuse, to pay and satisfy the sum aforesaid; whereby, by force of the condition aforesaid of the said writing obligatory, an action hath accrued to the said plaintiff to demand and have of and from the said defendants herein the said sum of dollars first above demanded.

Yet, the said defendants, although often requested, have not, nor has either of them, as yet paid to the said plaintiff, or the said, the said sum of dollars, or any part thereof, but the same to pay have hitherto wholly refused and still do refuse, to the damage of the said plaintiff of dollars. And therefore suit is brought.

1753 Obstruction of highway; notice, requisites

A notice to remove an obstruction in a road must show the place of the obstruction so that the person notified may ascertain his rights under the notice.⁵⁰

1754 Official bond; action, demand

It is not necessary in Illinois to make a demand upon a public official as a condition precedent to the right of bringing a civil action on his bond.⁵¹

1755 Practicing medicine without a license, action

The statute which prohibits the practice of the medical profession without a license is valid and includes the practice by a person whose license has been revoked.⁵²

1756 Practicing medicine without a license, declaration requisites

A count or declaration for a penalty imposed by the act of 1899 is good without averring that the defendant began practicing medicine after July 1, 1899, the gist of the action being the practicing or continuing to practice without a license.⁵³

1757 Practicing medicine without a license, Narr. (Ill.)

The people of the state of Illinois, plaintiff, which sues in this behalf for the use of the State Board of Health, by its attorney, complains of of said county, defendant in this suit, of a plea of debt that the defendant render to this plaintiff, the people of the state of Illinois for the use of the State Board of Health, the sum of dollars which the defendant owes and unjustly detains from the plaintiff.

And for that whereas, the defendant,, on, to wit, the day of, 19.., did, in said county of and state of Illinois, unlawfully practice medicine and surgery, and treat human ailments, and operate on and prescribe for physical ailments and physical injury to others, and the said defendant did not then and there and during the time he so practiced medicine

⁵⁰ Lovington v. Adkins, 232 Ill. 510, 516 (1908).

⁵¹ Cicero v. Hall, 240 Ill. 160, 166 (1909).

⁵² People v. Apfelbaum, 251 Ill.

18, 28 (1911); Sees. 6 and 9, Medical Practice act (Laws 1899, p. 275).

⁵³ People v. Langdon, 219 Ill. 189, 191 (1906).

and treated human ailments have or possess, and that said was on the day of, 19.., illegally engaged in the practice of medicine and has not since then applied for and obtained any lawful license or certificate from or through the State Board of Health of the said state of Illinois, as provided for by statute; whereby and by force of the said statute, an action has accrued to the plaintiff, the people of the state of Illinois, suing for the use and in behalf of the said State Board of Health to demand of the defendant the said sum of dollars.

Yet, the defendant, though requested, has not paid to the plaintiff the said sum of money or any part thereof, and refuses so to do, to the damage of the plaintiff, the people of the state of Illinois, suing for the use of the State Board of Health of dollars; and therefore, the said plaintiff brings suit, etc.

.....

Attorney for plaintiff.

1758 Promissory note, holder against maker and endorsers, Narr. (Va.)

For this, to wit, that heretofore, to wit, on the

day of, 19.., the said according to the custom and usage of merchants, made his certain promissory note in writing, commonly called a negotiable note, the date whereof is the day and year aforesaid, and then delivered the same to the said and, whereby he promised and agreed days from the date thereof, for value received, to pay to the said and, or their order, \$....., parcel of the sum above demanded. And the said plaintiff says that the said and, according to the custom and usage of merchants, afterwards, to wit, on the same day endorsed and delivered the said note, still being unpaid, to the said, who, according to the custom and usage of merchants afterwards on the same day endorsed and delivered the said note, still being unpaid, to the said plaintiff. (Repeat similar averments to cover subsequent endorsements, if any) And the said plaintiff avers that afterwards, to wit, on the day of, 19.., when, according to the tenor and effect thereof, and according to the custom and usage of merchants, the said note became due and payable, the same was duly presented and shown for payment, but the said defendants did not, nor did either of them, nor did any other person, then pay the sum of \$..... specified in the note, nor any part thereof; whereupon the said note was afterwards, to wit, on the last mentioned day, duly protested for non-payment thereof, according to the custom and usage of merchants, and the said plaintiff was thereby obliged to pay,

and did pay, for costs of said protest, the sum of dollars, which, together with the said sum of \$..... makes up the sum of \$...... above demanded; of all of which said several promises the said defendants had due and legal notice. By means whereof, and by force of the statute in such a case made and provided and by reason of the non-payment of the said sum of \$..... above demanded, an action hath accrued to the said plaintiff to demand and have of and from the said defendants the said sum of \$..... with lawful interest thereon from until payment. Yet, the defendant (Concludes as in other cases).

1759 Promissory note, payer against maker, Narr. (Md.)

For that the said defendants by their writing obligatory, now overdue, bearing date the day of, 19..., promised to pay to the plaintiff months after date the sum of dollars, with interest at per cent, but have not paid the same nor any part thereof, except the interest on said obligation to the day of, 19...

And the plaintiff claims therefore the sum of dollars.

(West Virginia)

For this, to wit, that heretofore, to wit, on the day of, 19..., the said defendant made and signed, and then delivered to the said plaintiff, his certain note, in writing, commonly called a promissory note the date thereof is the day, month and year aforesaid, and thereby promised and agreed to pay to said plaintiff the said sum of dollars (\$.....), with interest thereon from date, on or before the day of, 19... Which said note in writing is in the words and figures following, to wit: (Set out promissory note).

Yet, the said defendant, etc.

Affidavit of amount due

(Venue)

....., the plaintiff named in the foregoing action, being duly sworn says there is, as he verily believes, due and unpaid from the said defendant to the said plaintiff, upon the demands stated in the declaration in said case, including the principal and interest to this date after deducting all payments, credits and setoffs made by the said defendant to which the said defendant is in anywise entitled, the sum of dollars.

Taken, etc.

.....

1760 Railroad tax statement, declaration requisites

In an action against a railroad company to recover the statutory penalty for failure to make statements under the Revenue act, the declaration must charge a failure to make detailed statements required by section 41 or 48 and not a failure to make an annual report of "railroad track" under the concluding portion of section 41, or a failure to make the "lists or schedules" of "rolling stock" under section 44, or a failure to make a list of personalty and real property other than "rolling stock" or "railroad track" under section 46 of the Revenue act. The penalty required under section 49 of said act refers to the detailed statement required to be filed under section 41 of said act setting forth a detailed description of the right of way, the main track, side and second tracks of the railroad, etc., and a description of each tract of land through which the railroad runs in accordance with the United States surveys; or, statements and schedules required by section 48 of said act to be filed with the auditor of public accounts.⁵⁴

1761 Receiver in bankruptcy bond, action

The surety upon a receiver's bond which has been given under section 69a of the Bankruptcy act is liable if the petition for the appointment of the receiver has been dismissed and there has been a wrongful detention of the property, without showing malice or probable cause, and without waiting for the bankruptcy court to fix and allow the damages.⁵⁵

1762 Registration bond fund, action

The state treasurer and the auditor of public accounts have no right to receive out of the state treasury, in addition to their salaries, clerk hire and other expenses fixed by law and appropriated by the legislature, the amount, in whole or in part, collected by the state as costs for collecting and disbursing the registration bond fund; and bondsmen are liable to the state for any misappropriation of any part of said fund by their principals.⁵⁶

⁵⁴ Chicago, Rock Island & Pacific Ry. Co. v. People, 217 Ill. 164, 171 (1905).

⁵⁵ Hill Co. v. United States Fidelity & Guaranty Co., 250 Ill. 242, 247,

250 (1911); Secs. 69a and 3e, Bankruptcy act.

⁵⁶ People v. Simonds, 254 Ill. 612, 613 (1912).

1763 Replevin bond, action, damages

The obligors of a replevin bond are liable in an action thereon for nominal damages or for the value of unreturned goods at the date they were replevied and legal interest from that date where the plaintiff fails to prosecute his replevin suit to final judgment or where he voluntarily dismisses it and returns only a part of the property.⁵⁷

1764 Replevin bond, coroner, Narr. (Ill.)

For that whereas, the defendants, on the day of, 19.., at, to wit, in the county aforesaid, by their writing obligatory, bearing date of that day, did jointly and severally acknowledge themselves, to be held and firmly bound unto the plaintiff.., then being coroner of the county aforesaid, in the sum of dollars, above demanded to be paid to the plaintiff.., which said writing obligatory was and is subject to certain condition thereunder written, whereby after reciting to the effect that one, on the day first aforesaid, sued out of the said court of said county, in the state of Illinois, a certain writ of replevin, against the said sheriff, and one, for the recovery of certain goods and chattels in said condition described, it was provided that if the said should prosecuteh.... suit to effect, and without delay, and should make a return of said property, if return thereof should be awarded, and save and keep harmless the said plaintiff.., so being coroner as aforesaid, in replevying the said property, and should pay all costs and damages occasioned by wrongfully suing out said writ of replevin, then the said writing obligatory was to be void; otherwise, to remain in full force and effect, as by the said writing obligatory and condition thereof, remaining on file in the said court, will more fully appear.

The plaintiff.. in fact say.. that the said did not prosecuteh.... suit to effect, and without delay, but therein wholly failed; and thereupon, afterwards, to wit, at the term of said court, on, to wit, the day of, 19.., it was considered by the said court that the said should take nothing byh.... said writ, and thath.... plaintiff.. should go thereof without day and should have return of the said goods and chattels.

The said plaintiff.. further in fact say.. that the said did not make return of the said goods, and chattels or any part thereof, but ha.... hitherto refused and still do.. refuse.. so to do.

⁵⁷ *Franks v. Matson*, 211 Ill. 338, 345, 347 (1904).

The plaintiff.. further say.. that the suing out of the said writ of replevin, was wrongful, that the plaintiffw.... compelled to and did employ counsel to defend the said replevin suit, and w.... compelled to and did pay out a large amount, to wit, dollars for attorney's fees, in defending said replevin suit; whereby an action has accrued to the plaintiff.. to demand of the defendant.. for the use aforesaid the said sum of dollars, above demanded. Yet the said defendant.. though often requested, ha.. not paid to the plaintiff said sum of money, above demanded, or any part thereof, but refuse.. so to do, to the damage of the plaintiff.. for the use aforesaid of dollars; and therefore, for the use aforesaid, he brings this suit.

b

For that whereas, on the day of, 19.., in the county and state aforesaid, made his complaint to the court of county aforesaid, of the taking and unjustly detaining of his goods and chattels by and thereby prayed that the said goods and chattels therein described might be forthwith replevied and delivered to him, the said by the coroner of the county aforesaid, and the said then and there made oath before the clerk of the said court that he, the said was then the owner and lawfully entitled to the possession of the said goods and chattels, and that said goods and chattels were then of the value of (\$.....) dollars, and that the said goods and chattels had not been taken for any tax, assessment or fine levied by authority of any law of this state, nor seized under any execution or attachment against the goods or chattels of him, the said, liable to execution or attachment; and thereupon there issued then and there from the said court a certain writ of replevin directed to the coroner of said county, (being the plaintiff herein) whereby the people of the state of Illinois commanded such coroner that if the said should give bond to said coroner with good and sufficient security to prosecute the suit of the said in that behalf to effect and without delay, and to make return of the said goods and chattels, if return thereof should be awarded, and to save and keep harmless such coroner in replevying the said goods and chattels, then, said coroner should, without delay, replevy and deliver to the said the said goods and chattels which the said took and unjustly detained, as it was said, and that the said coroner should have that writ, together with said bond before said court on the day of the then next term thereof: which said writ on the day aforesaid was there delivered for execution thereof to the plaintiff, who then, and from then until, and

at and after the time of the making of the writing obligatory hereinafter mentioned and the replevying of the said goods and chattels as hereinafter mentioned, was coroner of the county aforesaid.

And thereupon the plaintiff, so being such coroner as aforesaid, took from the said as principal, and from the said and, as good and sufficient securities, bond in double the value of said goods and chattels so about to be replevied, and on that occasion they, the said and the said and then and there by their writing obligatory, commonly called a replevin bond, bearing date of the day aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the plaintiff, so being such coroner as aforesaid, in the sum of (\$.....) dollars above demanded to be paid to the plaintiff; which said writing obligatory was and is subject to a certain condition thereunder written, to the effect that if the said should prosecute his said suit to effect and without delay, and should make return of said goods and chattels if return thereof should be awarded and should save and keep harmless the plaintiff, so being such coroner as aforesaid, in replevying the said goods and chattels, then the said writing obligatory was to be void, otherwise to remain in full force and effect, as by said writing obligatory and the said condition thereof, remaining filed in said court, will appear (a copy of which said writing obligatory is hereto attached and made a part hereof).

And thereupon the plaintiff, so being such coroner as aforesaid, by virtue of the said writ then and there replevied and made deliverance of the said goods and chattels to the said as by the said writ the plaintiff was commanded.

And afterwards in the said court, as of the said term thereof, in the year 19.., the said filed his declaration against the said and the said complained of the said of a plea wherefore he, said took the goods and chattels of him, the said in said declaration more particularly described, and them unjustly detained until, etc., to the damage of him, the said of (\$.....) dollars; and such proceedings were thereupon had in said plea in the said court, that afterwards, to wit, on or about the day of, 19... judgment was entered by said court whereby it was considered and ordered by the said court that the said make return within days after the date of entry of said judgment and order, of the property seized under authority of the said replevin writ theretofore issued in the said cause, and that in default of such return the said have and recover of and from the said the sum of, the said sum being the amount of the

judgment with taxed costs, (or which said property was rightly held under and by virtue of a writ of execution at the time it was seized as aforesaid) together with interest thereon at the rate of per cent per annum from the day of, 19.., to the day of, 19..; and that in default of the return by the plaintiff (said) of the property in accordance with said order, the defendant (said) have execution for said sum of

And thereupon the said excepted to the entry of said judgment of said court and prayed an appeal therefrom to the appellate court for the district of the state of Illinois, which said appeal was allowed and in due course perfected.

And the said appellate court, after due consideration of the case and of the briefs and arguments made and filed by the parties to said cause, entered an order of judgment on, to wit, the day of, 19.., fully sustaining and confirming in all respects the said order and judgment of the court.

And thereupon the said prayed an appeal from said order of the said appellate court to the supreme court of the state of Illinois, which said appeal was allowed and in due course perfected.

And the said supreme court, after due consideration of the case and of the arguments and briefs filed in said case by the parties thereto, entered an order on, to wit, the day of, 19.., fully confirming and sustaining in all respects the said order and judgment of the said (superior) court.

And thereafter, on, to wit, the day of, 19.., a copy of said order of affirmance of said supreme court, duly certified by the clerk of said court, with the seal of said court affixed, was filed in said court of county.

And the plaintiff herein says that the said in fact did not make return of said goods and chattels within the days specified in the order of the court in said cause, nor at any other time whatsoever, and that the said, did not pay the sum of or any part thereof, or any sum of money whatsoever, as ordered by the judgment of the said court in the said cause; and the plaintiff further says that prior to the beginning of this suit the said died, and that prior to and up to the time of his death, the said wholly failed and refused to make return of the said goods and chattels, or to make payment of said sum of money as ordered as aforesaid by the judgment of said court; and that none of said goods and chattels so ordered to be returned have ever been returned to, and no part of said money so ordered to be paid has ever been paid to said

And the plaintiff further avers that it was necessary for said

..... (for whose use this suit is brought), and he was obliged, to employ, and he did employ attorneys to defend said replevin suit brought by said against said and to protect the interests and rights of said in the said replevin suit and in the appeals taken by the said in said cause to the appellate and supreme courts as aforesaid. And in such behalf said was obliged to pay as just and reasonable attorneys' fees the sum of dollars; and the plaintiff says that by the said action of said he was further damnified to the extent of the taxable costs in said replevin suit, and that he, the plaintiff herein, should recover from the defendants in this suit said sum of dollars attorneys' fees, and also the amount of said taxable costs, and also his reasonable attorneys' fees in this cause as further damages; whereby an action has accrued to the plaintiff to demand of the defendants for the use aforesaid, the sum of dollars above demanded. Yet, the defendants, though often requested, have not paid the plaintiff the said sum of money above demanded, or any part thereof, but refuse so to do, to the damage of the plaintiff, for the use aforesaid, of dollars, and therefore, for the use aforesaid, plaintiff brings this suit.

1765 Replevin bond, sheriff, Narr. (Ill.)

For that whereas, the said on the day of, .., subscribed and made oath to an affidavit and filed the same with the clerk of the court of the county aforesaid, that was wrongfully detaining the goods and chattels of said to the value not exceeding dollars, and that said was then and there the owner and lawfully entitled to the possession of said goods and chattels and that they had not been taken for any taxes, assessments or fine levied by virtue of any law of this state, nor seized on any execution or judgment against the goods and chattels of said, or held by any writ of replevin against the said; that thereupon there issued then and there from said court of the county aforesaid a certain writ of replevin directed to the sheriff of said county, whereby the people of the said state of Illinois commanded said sheriff that if the said should give bond to said sheriff, with good and sufficient security to prosecute the suit of the said in that behalf to effect and without delay and to make return of the goods and chattels if return thereof should be awarded, and to save and keep harmless said sheriff in replevying the said goods and chattels, then such sheriff should without delay replevy and deliver to the said the said goods and chattels which the said took and unjustly detained as it was said, and that said sheriff

should have the writ, together with said bond, before said court on the of the term next thereof, which said writ on the day as aforesaid was there delivered for execution thereof to the plaintiff, who then and there thence until and after the time of the making of the writing obligatory hereinafter mentioned, and the replevying of said goods and chattels hereinafter mentioned, was sheriff aforesaid; that thereupon the plaintiff so being such sheriff as aforesaid, took from the said and from the said a good and sufficient surety bond in double the value of said goods and chattels as alleged in said affidavit so about to be replevied, and that on that occasion they, the said and, by their writing obligatory, commonly called a replevin bond, bearing date the day first aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the plaintiff, so being such sheriff, as aforesaid, in the sum of dollars above demanded to be paid to the plaintiff; which said writing obligatory was and is subject to a condition thereunder written to the effect that if the said should prosecute his suit to effect and without delay and should make return of said goods and chattels, if return thereof should be awarded, and should save and keep harmless the plaintiff so being such sheriff, as aforesaid, in replevying the said goods and chattels, then the said writing obligatory was to be void; otherwise to remain in full force, as by said writing obligatory and the said condition thereof, remaining on file in the said clerk's office, will more fully appear. And thereupon the plaintiff, so being such sheriff, as aforesaid, by virtue of the said writ then and there replevied and made deliverance of the said goods and chattels to the said, as by said writ the said sheriff was commanded.

And the plaintiff in fact says, that the said did not prosecute his said suit to effect, but therein wholly failed. And thereupon afterwards, on the day of,, being one of the regular days of the term,, of said court, the said, not having filed his declaration in said replevin suit within the time required by law, on motion of the said defendant,, to dismiss said replevin suit and on notice to the plaintiff's attorney, it was considered by the said court that the said should take nothing by his said writ and that the said should go thereof without day, and should have a return of said goods and chattels.

And the plaintiff further, in fact says, that the said did not make a return of the said goods and chattels, but has hitherto refused and still does refuse so to do; whereby an action has accrued to the plaintiff for the use aforesaid, in the sum of dollars above demanded. Yet, the said defendants, though often requested, have not paid to

the plaintiff the said sum of money as above demanded, or any part thereof, but refuse so to do, to the damage of the plaintiff, for the use aforesaid, of dollars; and therefore, for the use aforesaid, he brings his suit, etc.

1766 Ringing bell or sounding whistle, declaration requisites

A declaration in debt for failure to ring a bell or sound a whistle as is required by statute, must state the time of day the violation of the statute took place, whether the train was freight or passenger, and in what direction it was running at the time.⁵⁸

1767 Sheriff's bond, parties

In Michigan an action upon a sheriff's bond must be brought in the name of the people of the state of Michigan for the use and benefit of the injured party who is deemed to be the real plaintiff in the suit.⁵⁹

1768 Statutory penalties; action, nature, parties

An action of debt for the recovery of a penalty given by statute for the violation of a purely statutory offense, is civil in its nature and the rules of criminal pleading and procedure are inapplicable.⁶⁰ A statutory penalty is recoverable in the name of the informer, for his own use, or *qui tam*, in an action of debt.⁶¹

TAXES

1769 Agents and personal representatives, action

Agents and others who are acting in a representative capacity, having in their possession their principal's or an estate's property, are personally liable for the payment of taxes assessed against them on account of said property.⁶²

1770 Capital stock tax; declaration requisites, proof

In an action of debt against a corporation to recover upon a capital stock tax, the declaration should aver, and the aver-

⁵⁸ Ohio & Mississippi Ry. Co. v. People, 149 Ill. 663, 666 (1894).

⁵⁹ (9781), C. L. 1897 (Mich.).

⁶⁰ People v. Gartenstein, 248 Ill. 546, 551 (1911); Sec. 9, Laws 1899, p. 273.

⁶¹ Mount v. Hunter, 58 Ill. 246, 248 (1871).

⁶² People v. Hibernian Banking Ass'n, 245 Ill. 522, 526 (1910); Sec. 256, Revenue act (Hurd's Stat. 1909, p. 1870).

ment must be proved, that the defendant company, at the time it was assessed had its principal office or place of business within the municipality and county where the tax was imposed.⁶³ The omission of this averment cannot be urged by motion in arrest of judgment, but the want of proof of the allegation is available after verdict.⁶⁴

1771 Real estate tax, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., the said defendant was, and still is indebted to the plaintiff in the sum of, to wit, (\$.....) dollars, for and on account of divers amounts of taxes, penalties, interests and costs, before that time due and unpaid upon a certain taxable leasehold estate and improvements situated and described as follows: (Give legal description) situated in county and state of Illinois.

That said leasehold and improvements are on the right of way of the railroad company, and are assessed and taxed as real estate in accordance with the statute in such case made and provided.

That the said defendant was the owner of said real estate on the first day of April in each of the years that the taxes hereinafter described were assessed and levied; that in and for the several years of 19.., 19.. and 19.. taxes for state, county, municipal and other lawful purposes were duly assessed and levied upon the said described real property, all of which more fully appears upon the collector's tax warrants of said county, reference to which is hereby made.

That the said taxes assessed and levied as aforesaid in and for the said years 19.., 19.. and 19.. and the penalties, interests and costs which have accrued thereon, remain and are due and unpaid upon said real property, and that by reason of the said defendant's neglect to pay said taxes, penalties, interests and costs when the same were due, the said described real property became and was forfeited to the state of Illinois in each of said years, as fully appears upon said collector's books, and the tax, judgment, sale, redemption, and forfeiture record of county, reference to which is hereby made; and that said forfeitures were duly carried forward upon said collector's books for the year 19.., and that the whole amount now due is the sum of (\$.....) dollars.

Wherefore and whereby, the said defendant became and is indebted to the plaintiff, the people of the state of Illinois, in the sum of (\$.....) dollars on account of said taxes, penalties, interests and costs so accrued as afore-

⁶³ *Twin City Gas Works v. People*, 156 Ill. 387, 390 (1895).

⁶⁴ *Twin City Gas Works v. People*, *supra*.

said, which said sum of money was to be paid to the plaintiff by the defendant when he should be thereto requested; yet the defendant, though often requested, has not paid the plaintiff the said sum of money, or any part thereof, but refuses so to do, to the damage, etc.

1772 Trustee's bond, Narr. (D. C.)

For that heretofore by her last will and testament, duly admitted to probate and record in the supreme court of the District of Columbia, holding a probate court, one F, a resident of the District of Columbia, since deceased, devised all the rest and residue of her estate, including the property which thereafter came into the possession of W, as hereinafter referred to, to H, M and R, as trustees, to hold in trust and manage and invest the same, to pay the net income therefrom to E and B during their joint lives, and after the death of either one of them to pay such net income to the survivor, and at the death of both of said E and B to pay the entire remainder and residue of said estate to

That the said M declined to accept the trust created by the said will, and thereafter the said H and R qualified as executors and trustees of said estate.

That said H and R continued to act as trustees of the estate of said F and received the moneys of said estate, including the funds which afterwards came into the hands of said W, as aforesaid, until the month of, and upon his own application R, on the day of, was relieved and discharged of the said duties as trustee of said estate of F, and the said W was appointed in his place and stead to act as trustee with the said H.

That all the funds and assets of the estate of said F, both real and personal, came into the possession of the said H and W, trustees, after the said W had filed in equity cause number on the docket of the supreme court of the District of Columbia, his bond in the following words and figures, to wit: (Insert bond).

That by this writing obligatory, duly sealed, which is now here shown to the court, on, to wit, the day of, 19.., the defendant,, a body corporate, as surety and the said, by the name of W, as principal, acknowledged themselves to be indebted to the United States of America, the plaintiff, in the sum of dollars for the payment of which the said defendant, a body corporate as aforesaid, and the said W did bind themselves jointly and severally, and their and each of their joint and several heirs, executors and administrators.

That on, to wit, the day of, the said W, in conjunction with the said H, as trustees, received all the

funds of said estate including the fund hereinafter referred to. And it became and was the duty of the said W well and truly to perform the duties imposed on him as trustee by the decree passed in said equity cause number on the docket of the supreme court of the District of Columbia, wherein R, trustee, was complainant, and E, B and were defendants; which duties are fully set forth and defined in the said decree, which is in words and figures following, to wit: (Insert decree in full, omitting title).

That after the signing of said decree and after the said W had qualified as trustee by the giving of the bond hereinbefore referred to, there came into his hands, as such trustee, notes, securities, cash and funds belonging to the said estate aggregating dollars, all of which was personal estate, in addition to the taking possession of the real estate of the said F, deceased, in conjunction with the said H as his co-trustee.

That after the execution of said writing obligatory, hereinbefore referred to, to wit, the writing obligatory dated on the day of, 19.., and approved on the day of, 19.., and on, to wit, the day of, 19.., the said W did enter upon his duties as such trustee in conjunction with the said H.

That the said W after the bond hereinbefore referred to had been duly approved, did enter upon his said office as trustee, on the day of, 19.., and held said office and remained therein until the day of, 19.., on which date by decree of the supreme court of the District of Columbia passed in equity, cause number, the said W was removed from his said office as such trustee, and S was appointed in his place and stead to act as trustee of said estate, in conjunction with the said H, trustee, and the said S was vested with all the powers of said W as set forth in the above mentioned decree passed in said equity cause number, as will be seen by a copy of said decree which is in the words and figures following, to wit: (Insert decree).

That the said W, after the giving of the bond aforesaid, and after entering upon the duties of his office as trustee as aforesaid and thenceforth during his continuance in said office, did not well and truly perform the duties of said office imposed upon him by the decree appointing him, nor did he, the said W, account for all the moneys received by him as such trustee, nor did he, when required, refund the moneys, securities and properties of said estate remaining in his hands unaccounted for, but the plaintiff avers that after the giving by said W, etc., of the bond aforesaid, and after the entering by the said W in his office as trustee as aforesaid, and during his continuance in said office, on, to wit, the day of, 19.., and on the day of, 19.., there came into the hands of the said W, and was in his possession as such

trustee, divers sums of money belonging to the estate of the said F, to wit, the sum of dollars, on the day of, 19.., and the sum of dollars on the day of, 19.., all of which moneys it was the duty of the said W as such trustee to account for.

Yet, the said sum of dollars, as aforesaid so as aforesaid coming into the hands of him, the said W as such trustee, he, the said W, did not faithfully expend, nor did he expend any part thereof for the benefit of the estate of the said F, nor for the benefit of E and B, or either of them, or for the, but, on, to wit, the day of, the said did wrongfully convert said sum of dollars to his own use and squander and expend the same for his own purposes, and, on, to wit, the day of, 19.., he converted to his own use and embezzled the said sum of dollars; and although called upon by the said H and S, trustees of the estate of F, as aforesaid, in the month of, he wholly refused and failed to refund said sum, or any part thereof, to them; and the said sum of is still unpaid and unaccounted for by the said W to the estate of said F, or to S, surviving trustee, contrary to the form and effect of the conditions of said writing obligatory hereinbefore referred to.

That notwithstanding the said bond and conditions thereto annexed, which conditions have been broken as aforesaid, the said though often requested so to do, has refused and still refuses, to pay the plaintiff the said sum of dollars, penalty of said writing obligatory hereinbefore referred to, and the plaintiff claims of said, etc.

SPECIAL DEFENSES, PLEAS, ETC.

ADMINISTRATOR'S BOND

1773 Breach, denial, plea (Ill.)

That the said B, administrator as aforesaid, has not wholly failed and refused, and does not still refuse, to pay the amounts due them respectively to the persons entitled thereto, as alleged in the said declaration under the first breach of the bond the whole or any part so found due as aforesaid as therein alleged. And of this the defendant puts himself upon the country, etc.

1774 Fraudulent conversion, plea (Ill.)

That subsequent to the making of the alleged bond in the said declaration mentioned the said defendant, B, as administrator of the estate of J, deceased, did, with the advice, consent and connivance of the parties for whose use this suit

is brought, fraudulently and unlawfully convert to his own use the various sums of money in the said declaration mentioned and described as having come to his possession as such administrator. And this the said defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have its aforesaid action against him.

Replication

That subsequent to the making of the said bond in the declaration mentioned, the said defendant, B, as administrator of the estate of J, deceased, did not, with the advice, consent or connivance of the parties for whose use this suit is brought, or any of them, convert to his own use the various sums of money in the said declaration described as having come to his possession as such administrator, or any of them; and the plaintiff says that the said defendant B, as administrator, etc., as aforesaid, did convert to his own use the various sums of money in said declaration mentioned, in manner and form as therein described; and this the plaintiff prays may be inquired of by the country.

1775 Non-damnificatus, plea (Ill.)

That the plaintiff, or the persons for whose use this suit is brought have not, at any time since the making of the said writing obligatory and condition thereof hitherto, been in any wise damnified by reason of any matter or thing in the said condition mentioned; and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action, etc.

Replication

That the persons for whose use this suit is brought have been, since the making of said writing obligatory and the condition thereof, damnified by the matters and things in said condition mentioned, as in the declaration alleged; and this the plaintiff prays may be inquired of by the country.

1776 Nul tiel record, plea (Ill.)

That there is not any record in the court of county wherein it was adjudged by the said court that the said defendant,, as administrator of the estate of, deceased, held the amounts mentioned in the said declaration for the use of the parties therein stated, and wherein it was ordered and decreed that the said, as such administrator, do pay within days from the making of said alleged order to the parties sev-

erally entitled to said sums of money that is to say, that he should pay to (Name parties and amounts), remaining in the said court of county, in manner and form as the plaintiff has above, in his said declaration alleged: (Conclude as in Section 1774).

Replication

That there is such a record of the orders and proceedings of court of county, remaining in the court of county, as the plaintiff has in and by his declaration alleged, and this the plaintiff is ready to verify by the said records ready to be produced in this court, and the plaintiff prays that the same may be seen and inspected by the court here, and a judgment rendered as in the declaration prayed.

1777 Performance, plea (Ill.)

That the defendant B has faithfully performed the acts required of him, or his duties as administrator of the estate of J, deceased, according to the terms of the conditions of the writing obligatory mentioned in the said declaration, and has not wholly filed and refused so to do; and of this he puts himself upon the country, etc.

1778 Waste, denial, plea (Ill.)

That the said B, administrator of the estate of J, deceased, has paid the sums of money and every part thereof, and has not wasted the moneys and effects and does not wholly fail and refuse to pay any part thereof to the parties entitled thereto, as is alleged in the said declaration under the last breach of the bond therein alleged. And of this the defendant puts himself upon the country, etc.

1779 Appeal bond, judgment, validity

A defendant, whether obligor or surety, cannot raise the question of validity of the judgment mentioned in an appeal bond, in an action upon the bond.⁶⁵

1780 Appeal bond, nul tiel record

A plea of *nul tiel* record is inappropriate to an action upon an appeal bond.⁶⁶

⁶⁵ McCarthy v. Alphons Custodis Chimney Construction Co., 219 Ill. 616, 622, 624 (1906).

⁶⁶ McCarthy v. Alphons Custodis Chimney Construction Co., 219 Ill. 624.

1781 Bail bond; bankruptcy discharge, plea requisites

In an action of debt upon a bail bond, the bail may plead the principal's discharge in bankruptcy obtained before the bail's liability was fixed by the issuance of a *capias at satisfaciendum* and a return thereof, without averring or showing the entry of a former *exoneretur*.⁶⁷

1782 Bail bond; bankruptcy discharge, plea (Ill.)

For a plea in this behalf the said defendant says that he ought not to be charged with the said debt by virtue of the said supposed writing obligatory, because he says that the several supposed causes of action in the said declaration are one and the same, to wit, the cause of action on the said writing obligatory mentioned and set forth in the said count of the said declaration; and that the said writing obligatory was a bail bond given by the said as principal, and signed by this defendant and others as sureties, which said bond was given to release the said from imprisonment on a *capias ad respondendum* sued out of the court of county, Illinois, on the day of, 19.., in a certain suit in assumpsit lately pending in said court, wherein the said, above usee, was plaintiff and the said defendant, and which said writing obligatory was taken and accepted as and for the bail bond of said, by the said plaintiff, who was then sheriff of the said county, and the said, on the said day of, 19.., was duly released from imprisonment on said *capias* by reason of the giving and accepting of said writing obligatory as a bail bond by said sheriff.

And the defendant further avers that the said cause of action in the said suit wherein the said was plaintiff, and the said, was defendant, so pending in the said court, was an action in assumpsit of trespass on the case on promises for damages for an alleged breach of promise to marry, the declaration in said cause on which the said case was tried being in words and figures as follows, to wit: (Insert declaration *in haec verba*).

And the defendant further avers that on the trial of said cause in the said court of county, a jury awarded a verdict to the said, in the sum of dollars, and that afterwards, to wit, on the day of, 19.., a judgment was duly entered in said court in said cause, in accordance with

⁶⁷ Keys v. Bennett, 218 Ill. 625, 628 (1905).

the verdict of the jury, in favor of the said, and against the said, for the sum of dollars and costs of suit; from which said judgment no appeal was ever presecuted by either the said, or the said

And the defendant further avers that on the day of, 19.., the said filed in the district court of the United States, in and for the state of Illinois, in the district thereof, a petition in bankruptcy, signed, verified, and in all things as was provided by the National Bankruptcy law then in full force and effect, listing and including in the liabilities of the said, the said judgment so entered in the said court of county in the said cause of against the said, including the cost thereof; and that afterwards, to wit, on the day of, 19.., the said was by the said district court of the United States for the said district of, duly discharged from all debts and claims provable in said court by the said Acts of bankruptcy against the said, which existed against the said, on said day of, 19.., which certificate of discharge in bankruptcy is under the seal of said court, and in words and figures as follows, to wit: (Insert certified copy of certificate of discharge).

And this defendant further avers that the judgment so entered in the said court of county, Illinois, in favor of the said, and against the said, was and is one of the debts from which the said was and is released and discharged by the said discharge in bankruptcy, and by the said discharge in bankruptcy hereinbefore set forth, the said was released and discharged from the said judgment, and from satisfying the same, by the payment of any money or by the surrendering of himself or his bondsmen of his body to the said court or to the sheriff of the said county, to be imprisoned on or by virtue of the *capias ad satisfaciendum* mentioned in the declaration of the said plaintiff.

And the defendant further avers that by reason of the premises, he and the said were each released from the surrendering up of the body of the said, in accordance with the condition of the writing obligatory mentioned in the plaintiff's declaration.

And the defendant further avers that by reason of the premises the defendant was released and discharged from performing any of the conditions mentioned in the said writing obligatory, and was and is discharged and released from the obligations thereof. And the said judgment in the said declaration

mentioned has, by reason of the premises, become cancelled, released and discharged. And this the defendant is ready to verify; wherefore, etc.

1783 Consideration, total failure; plea (Md.)

And for defense, upon equitable grounds, the defendants allege and charge that the parties to this suit are all residents of the state of Maryland, and were residents of said state at and prior to the time of the execution and delivery of said alleged bill or writing obligatory, and that prior to the execution and delivery by them to the plaintiff of said alleged bill or writing obligatory, and as an inducement thereto, and in consideration therefor the plaintiff, representing to the defendants that he was the legal holder of a certain lot or lots of oyster bottoms located in the waters of county and state of Maryland, pretended or undertook to sell and transfer the same to the defendants, and that solely by reason of the representation aforesaid the defendants were induced to sign and deliver to the plaintiff said bill or writing obligatory in settlement for said lot; and that afterwards, to wit, during or about the year 19. ., or subsequent thereto, the defendants discovered that the said lot or lots of oyster bottoms were located in the state of Virginia, and that the said plaintiff could not therefore legally hold or sell and transfer the same to the defendants at the time of said representation or afterwards; and that as a matter of fact, by actual survey conducted under the Shell Fish Commission of the state of Maryland, during or about said year 19. ., it was shown and determined that said lot or lots of oyster bottoms were actually within the state of Virginia, and these defendants aver and charge that the same are located wholly within the territory of the state of Virginia, and that the said plaintiff obtained from the defendants the said bill or writing obligatory by reason of said false representations of facts on his part as to the location of said lot or lots, and therefore should not recover upon the same against these defendants.

Replication

The plaintiff, by, his attorney, for replication to the plea (on equitable grounds) of the defendants, says:

That he denies that prior to the execution and delivery to the defendants by the plaintiff of the bill obligatory declared upon and as an inducement thereto and in consideration therefor, the plaintiff represented to the defendant that he was the legal holder of a certain lot or lots of oyster bottoms located in the waters of county, in the state of Maryland, pretended or undertook to sell and transfer the same to the

defendants, and that solely by reason of the representation aforesaid the defendants were induced to sign and deliver to the plaintiff said bill obligatory in settlement for said lots, and that afterwards, to wit, during or about the year 19.., or subsequent thereto the defendants discovered that the said lot or lots of oyster bottoms were located in the state of Virginia and that the said plaintiff could not, therefore, legally hold or sell and transfer the same to the defendants at the time of said representation or afterwards, and that as a matter of fact by actual survey conducted under the Shell Fish Commission of the state of Maryland during or about said year 19.., it was shown and determined that said lot or lots of oyster bottoms were actually within the state of Virginia and that the same are located wholly within the territory of the state of Virginia, and that the plaintiff obtained from the defendants the said writing obligatory by reason of said or any false representations of facts on his part as to the location of said lot or lots, and that the plaintiff should not recover upon the same against the said defendants.

1784 Estoppel

The sureties upon an official bond are estopped to deny the official character and acts of their principal during his continuance in office;⁶⁸ and the principals on a bond are estopped to deny the court's jurisdiction of legal proceedings requiring the execution of the bond and the institution of the proceedings thereunder.⁶⁹ Thus, the obligors upon a collector's bond given to a sheriff are estopped to deny the official capacity of the sheriff, his power to appoint deputy collectors, and the rightfulness of the appointment.⁷⁰

1785 Fraudulent representation, plea (W. Va.)

That the execution of the writing or supposed promissory note in said declaration mentioned was obtained from the defendant by fraud and circumvention; that is to say, that on the day of, 19.., the defendant,, came to this defendant and represented to him that he had purchased from the plaintiff a pair of mules, wagon and harness for the sum of \$.....; and that the said was to execute his several notes therefor, one of which is the note in the plaintiff's declaration herein de-

⁶⁸ Green v. Wardwell, 17 Ill. 278, 280 (1855); Shaw v. Havekluft, 21 Ill. 127 (1859).

⁶⁹ Bates v. Williams, 43 Ill. 494 (1867).

⁷⁰ Meyer v. Wiltshire, 92 Ill. 395 (1879). See Section 1779.

scribed; and that the said, represented to this defendant that he would procure the endorsement on said note of the names of and; and that this defendant represented to the said that if he would procure the names of said parties to be signed thereto, that this defendant would endorse said paper writing.

And that said brought said note to this defendant without having first procured the signatures or endorsement of the said and on said note; but that he represented to this defendant that if this defendant would sign the same that he would not deliver, dispose of, or not in any manner use said note until he had first obtained the endorsement of the said and thereon; and that this defendant, relying upon said representations, did sign said note upon the consideration and condition aforesaid, and upon no other consideration or condition did he sign the same; and that the said not regarding his said several promises and wholly disregarding the same, without first having obtained the signature of said and to said note, attempted to deliver the same to the said plaintiff.

And thereupon this said defendant, confiding in said false and fraudulent representations and promises aforesaid, made by the said defendant to this defendant of which false fraudulent representations and promises aforesaid the said plaintiff,, had notice, then and there executed the said writing to the said plaintiff, and not otherwise and without any other consideration whatever; and but for the said false and fraudulent representations and promises made to this defendant by the said plaintiff as aforesaid, this defendant would not have executed the said supposed writing or promissory note aforesaid, and by reason of said fraud and circumvention of the said plaintiff whereby he obtained from this defendant the said supposed writing or promissory note.

And this said defendant is ready to verify: wherefore he prays judgment if the said plaintiff ought to have his aforesaid action against him.

(Venue)

....., the defendant named in the foregoing plea, being duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be on information, and so far as they are therein stated to be upon information he believes them to be true.

.....
Defendant.

Taken, subscribed and sworn, etc.

1786 Guardian's bond; plea, requisites

In an action upon a guardian's bond a plea of discharge under the Illinois act of 1877 must allege all of the conditions precedent which are necessary in order to show a valid order of discharge.⁷¹

INDEMNITY BOND

1787 Dishonesty amounting to larceny, plea (D. C.)

That one of the express conditions of the writing obligatory sued upon was that this defendant should not be liable to the plaintiff herein for any cause save the personal dishonesty amounting to larceny or embezzlement of, and the said was not guilty under the terms of the bond for any personal dishonesty amounting to larceny or embezzlement.

1788 Notice of loss, plea (D. C.)

That one of the express conditions of the writing obligatory sued upon was that upon discovery by the employer (the plaintiff herein) that a loss has been sustained, the employer should immediately notify the company (defendant herein), in writing, at its principal office in the city of, and a failure to give such notice should relieve the company (defendant herein) from all liability thereunder. This defendant further says that the plaintiff did not give this defendant at its principal office in the city of immediate notice in writing of the loss sustained, as required by the terms of the said writing obligatory; wherefore, this defendant pleads the said failure of the plaintiff to perform the said condition precedent to maintain its said action against this defendant in bar of this suit.

1789 Prior misappropriation, plea (D. C.)

That one of the warranties of the writing obligatory sued upon, covenanted by the plaintiff herein, is that this defendant should not be liable for any sum whatever which the said for the faithful discharge of whose duty the said writing obligatory was given, should owe the plaintiff at the commencement of the term of the said writing obligatory, to wit, on the day of, 19... This defendant further says that, on, to wit, the day of, 19.., the said owed the plaintiff herein the trust fund amounting to dollars, referred

⁷¹ Kasper v. People, 230 Ill. 342, 350 (1907).

to in the declaration: wherefore, this defendant avers that under the terms of the said writing obligatory this defendant is not liable thereunder to the plaintiff herein for the loss, if any, suffered by the plaintiff in reference to such fund, and pleads the same in bar of this action.

1790 Intoxication, *res judicata*

In an action by children against a person who has wrongfully caused the intoxication of their father, the defendant cannot plead a judgment in his favor and against the widow of such person.⁷²

JUDGMENT OR DECREE

1791 Defenses generally

Such defenses only are available in an action upon a foreign judgment or decree as would be good in the courts of the state where the decree or judgment was rendered.⁷³

1792 Pleading

In an action of debt on a judgment of a court of record rendered in another state, the plea of *nul tiel* record is appropriate the same as in a similar action on a domestic judgment, and a plea of *nil debet* is inappropriate and demurrable.⁷⁴ But where the judgment is not that of a court of record, the plea should be *nil debet* and not *nul tiel record*.⁷⁵

⁷² Stecher v. People, 217 Ill. 351.

⁷³ Britton v. Chamberlain, 234 Ill. 246, 250 (1908).

⁷⁴ Lawrence v. Jarvis, 32 Ill. 304, 310, 312 (1863); Mills v. Duryee, 7 Cr. 481 (U. S. 1813); Bimeler v. Dawson, 4 Scam. 536, 540 (1843); Knickerbocker Life Ins. Co. v. Barker, 55 Ill. 241 (1870); Chipps v. Yancey, Breese, 19 (1819); Wood v. Agostines, 72 Vt. 51, 53 (1899); Marx v. Logue, 71 Miss. 905 (1894); Kemp v. Mundell, 9 Leigh, 12, 16 (Va. 1837); Tourigny v. Houle, 88 Me. 406 (1896).

The Tourigny case, *supra*, recognizes the practice of pleading *nul tiel* record to an action upon a foreign judgment. Anything which is there said to the contrary is *dictum* and is against the settled law on this point. At common law, a judgment of an independent jurisdiction or state had no extra-territorial effect. And as

each state in the United States, is generally regarded as separate and distinct from each other, a judgment in one state would have no force or effect in another state under the common law. But by virtue of the full faith and credit clause of the Federal constitution, the judgments of another state are to be given the same force and effect as domestic judgments. Thus in this particular, the entire United States is one jurisdiction. It is for this reason that the same kind of a plea that is pleadable to an action upon a domestic judgment is pleadable to an action upon a judgment of another state in the Union. If the action be upon a judgment of a foreign country, the plea of *nil debet* would be the right plea, as at common law.

⁷⁵ Graham v. Grigg, 3 Harr. 408, 410 (Del. 1841).

1793 Jurisdiction, court; plea (Ill.)

That there was not, at the time the said supposed judgment was rendered in the supposed court of the city of, county of, in the state of, and is not now, any such court as the said plaintiff.. ha.. in ..h.. said declaration alleged; and this the defendant.. ready to verify, wherefore ..he.. pray.. judgment, etc.

Replication

That there was at the time said judgment was rendered, the court of the city of, county of, of the state of, and that there is now such court, as in h.. declaration it is alleged; and of this ..he.. put..sel..... upon the country, etc.

1794 Jurisdiction, service, plea (Ill.)

That ..he.. w.... never served with any process or notice of the pendency of the proceedings in the supposed court in the city of, county of, in the state of, prior to the alleged rendition of the supposed judgment by the supposed court, wherefore ..he.. say.. that the said supposed court had no jurisdiction at the time when the supposed judgment was rendered to render the same, in manner and form as the plaintiff.. ha.. above in .. ha.. declaration alleged; and this the defendant.. ready to verify, wherefore ..he.. pray.. judgment, etc.

Replication

That the said defendant.. w.... personally served with process and notice of the pendency of the proceedings in said court, in the city of, county of, in the state of, prior to the rendition of said judgment; that thereby the said court acquired jurisdiction of the said defendant, and that said court was a court of general and superior jurisdiction, as appears from the record remaining in said court; and this the plaintiff.. ready to verify by said record, etc., and ..he.. pray.. that the same may be seen and inspected by the court here, etc.

1795 Nul tiel record; plea (Ill. and W. Va.)

That there is not any such record remaining in the said court of county and state of

....., as plaintiff.. ha.. above in declaration alleged. And this the defendant.. ready to verify; wherefore ..he.. pray.. judgment, etc.

Replication

That there is such record of the said recovery remaining in the court of the city of, county of, in the state of, as ..he.. h.. above in ..h.. said declaration alleged; and this the plaintiff.. ready to verify by said record, which ..he.. bring.. into court, etc., and ..he.. pray.. that the same may be seen and inspected by the court here, etc.

1796 Nul tiel record, proof

Upon a plea of *nul tiel* record in an action on a judgment, in Michigan it is only necessary to introduce in evidence the journal entry of the judgment, the calendar entries in the cause and the taxed bill of costs of the court in which the judgment was rendered, if there is proof that the files in the case have been mislaid or lost. Proof of a common law record of the judgment is not necessary in such a case.⁷⁶

1797 Set-off, pleading

A claim or demand which existed at the time the judgment was recovered, cannot be set off in the suit upon the judgment at common law, or under the statute.⁷⁷

1798 Non damnificatus, pleading

To an action on a bond, a plea of no damages (*non damnificatus*) is good if the bond merely indemnifies the obligee and it is necessary to raise an issue as to its nature and character; but such a plea is bad if the bond contains an affirmative covenant to do a specific thing, in which case liability must be adjudged notwithstanding the absence of loss from non-performance.⁷⁸

⁷⁶ Norvell v. McHenry, 1 Mich. 227 (1849).

⁷⁷ Rae v. Hulbert, 17 Ill. 579; Sec. 47, Practice act 1907 (Hurd's Stat. 1909, p. 1701).

⁷⁸ Westfall v. Albert, 212 Ill. 68, 71, 74 (1904).

1799 Non damnificatus, plea, general (Ill. and W. Va.)

That the plaintiffs have not, at any time since the making of the said writing obligatory and conditions thereof, hitherto, been in any wise damnified by reason of any matter or thing in the said condition mentioned: and this the said defendants are ready to verify; wherefore they pray judgment if the plaintiffs ought to have or maintain their aforesaid action thereof against these defendants, etc.

Replication

That they have been in every way damnified by means of the matters and things in the said conditions of the said writings obligatory mentioned; and of this they put themselves upon the country, etc.

*Replication***1800 Non damnificatus, plea, special (Ill.)**

That before the writing obligatory in said declaration described was executed, a suit, general number, was pending in the court, of county,, on the chancery side thereof, wherein said plaintiff,, was the petitioner, and, and these defendants, and and others, were defendants; that in and by his said petition the said claimed title to the premises mentioned in said writing obligatory described in said declaration; that said defendant,, answered said petition and filed his cross-bill in said cause, claiming title to said premises in fee simple and seeking thereby to have his said title confirmed; that on or about the day of, 19.., an order was entered by the in said cause of, upon the *ex parte* application of said, the petitioner, restraining the said and the said from working and constructing, piling and building upon the premises in question in said suit; that afterwards, to wit, on the day of, 19.., the following order was entered in said cause: (Insert copy of order).

That said chancery suit of v., is still pending and undetermined; that the writing obligatory in said declaration mentioned was executed by these defendants pursuant to said order of said, 19..; that the agreement of the parties to said bond in open court, at the time of the application for the modification of said injunction was that said should receive an indemnifying bond; that acting upon said agreement and understanding, said bond was executed for the sole purpose of in-

demnifying said against damage in case the conditions thereof should not be fulfilled; that the premises in question in said chancery suit and described in said writing obligatory, the subject matter of the declaration in this cause, are the premises and close, soil and freehold of said defendant,; that the said defendant,, therefore, in his own right, and the said, as the lessee of said, had a right to maintain and erect said building, piling, etc.; that if the said building, piling and other construction were not removed according to the terms of the conditions of said writing obligatory in said declaration mentioned the said plaintiff,, has not, at any time, in any wise been damnified, injured or harmed by reason or means of the erection and maintenance of said building upon said premises; and that the said has no right, title or interest in and to said premises in said writing obligatory described; and this the defendant is ready to verify; wherefore he prays judgment, etc.

1801 Non-performance by plaintiff; plea (recoupment) (Ill.)

⁷⁹That the said did not from time to time or at any time after the making of the said writings obligatory and the conditions thereof well and truly observe, perform, fulfill and keep all and singular the articles, clauses, conditions and agreements in the said conditions of the said writings obligatory sued on, specified, comprised and mentioned in all things therein contained on his part and behalf to be observed, performed, fulfilled and kept according to the tenor and effect, true intent and meaning of said conditions of said writings obligatory; but these defendants aver that said plaintiff did not and would not keep and perform, the conditions, specifications and clauses in said writings obligatory sued on, or either of them, in this that said plaintiff did not and would not complete said work as specified in said contract "ready for laying the track at by the day of, 19.., and thereafter as fast as may be required for laying the track," and did not and would not perform and complete said work in a workmanlike manner to the acceptance of the engineer, by means whereof these defendants saith they are injured and hath sustained damages by reason of the unskillful manner in which said work is constructed and the delay, expense and injury occasioned from the non-performance of said plaintiff in completing the same as provided in said writings obligatory sued on, in the sum of dollars, under and by virtue of the said writings obligatory by reason of the non-performance of said plaintiff; and the said defendants are ready and willing and hereby offer to recoup said damages according to the form of the statute in such

⁷⁹ Commence as inoyer.

cases made and provided; and this the defendants are ready to verify, wherefore, etc.

Replication

That the said plaintiff hath at all times truly observed, performed, fulfilled and kept all and singular the articles, clauses, conditions and agreements in said conditions of said writings obligatory sued specified, comprised and mentioned in all things therein contained on his part and behalf to be observed, performed, fulfilled and kept according to the tenor and effect, true intent and meaning of the said conditions of said writings obligatory; and of this he puts himself upon the country, etc.

b

That the said plaintiff after the making of said writings obligatory, commenced and entered upon the performance of all of the things by him in said writings agreed to be done and performed and was prosecuting the said work in all things as he by the said writings ought, when the said defendant, to wit, at in the city of to wit, at the county of heretofore, to wit, on the day of, 19.., made default and refused to pay said plaintiff for said work by him done and performed as by said writings stipulated, and refused and neglected to keep and perform the said conditions of said writings on said defendant's part to be kept and performed; and this he is ready to verify; wherefore, etc.

Rejoinder

That said plaintiff did not do and perform and was not performing the said work in all things as by said writings to have been done and performed as in said plea is set forth, and the said defendant says that he did not make default and refuse to pay said plaintiff on the day of, 19.., for said work by him done and performed as by said writings stipulated, and did not refuse and neglect to keep and perform the said conditions of said writings on the part of the defendant; and of this he puts himself upon the country, etc.

1802 Payment, plea (W. Va.)

That before the commencement of this suit, to wit, on the day of, 19.., the defendant paid to the plaintiff the debt in the declaration in this cause demanded; and of this the defendant puts himself upon the country, etc.

(Illinois)

⁷⁹That they, the said defendants, after the making of said writings obligatory and before the commencement of this suit, to wit, on the day of, 19.., at

⁷⁹ Commence as in oyer.

to wit, in the county and circuit aforesaid paid to the said all and every sum of money which had at any time before then become due and owing upon or by virtue of said writings obligatory and the said conditions thereof after each of the said several respective sums of money became and were due and owing under and by virtue of the said writings obligatory declared on and the conditions thereof; and this they are ready to verify; wherefore, etc.

1803 Payments, replication, (Ill.)

That the said defendant hath not paid at any time, to the said plaintiff any of the sums of money mentioned in said declaration in manner and form as the said defendant hath in said plea alleged; and of this he puts himself upon the country, etc.

1804 Performance, pleading

A plea of general performance, in an action on a bond, is insufficient, but the declaration should be met and answered specifically.⁸⁰

1805 Performance, plea (W. Va.)

That they have fully performed the said condition of the said bond in plaintiff's declaration mentioned, and of this they put themselves on the country.

(Illinois)

^{80a} That at the times and since the making of the said writings obligatory and the conditions therein contained he, the said, has truly kept and performed all and singular the articles, clauses, payments, conditions and agreements in said conditions of said writings obligatory mentioned according to the true intent and meaning of the same, and each of them; and this he is ready to verify; wherefore, etc.

1806 Performance, replication, (Ill.)

That the said defendant at the time of the making of the said writings obligatory and the conditions thereof, has not kept and performed any of the articles, clauses, payments, and conditions and agreements in said conditions of the said writings obligatory mentioned according to the true intent and meaning thereof; and of this he puts himself upon the country, etc.

⁸⁰ People v. McHatton, 2 Gilm. 732.

^{80a} Commence as in oyer.

REPLEVIN BOND

1807 Foreclosure under chattel mortgage, plea (Ill.)

That the merits of said replevin suit were not tried or determined in said action of replevin and because, at the time of the replevying of said goods and chattels, the right of property in and to said goods and chattels was in one and not in the plaintiff; and that before the replevying of said goods and chattels, to wit, on the same day that said goods and chattels were replevied, one, by his bailiff, the said, levied a certain distress warrant upon the said goods and chattels, claiming certain rent due from said, the owner of said goods and chattels; that within ten days after the levying of said distress warrant, as aforesaid, said made a schedule of all her personal property of every kind and character, including money on hand and debts due and owing to said, and delivered the same to said; that said schedule contained the description of said goods and chattels, as herein mentioned; that said goods and chattels, together with all the other personal property of said, were, at the time of the levying of said distress warrant and ever since have been of less value than the sum of dollars, to wit, of the sum of dollars; and these defendants further aver that at the time of the levying of said distress warrant and thence until the replevying of said goods and chattels and thereafter the said was the head of a family, consisting of ...self h.... and child, and that ..he, during all that time, resided with the same; that said goods and chattels were exempt from the levying of said distress warrant and the plaintiff had no right thereto; that the claim of title of said plaintiff is the claim of title as set forth in this plea and no other claim of title; that the said before the commencement of said replevin suit conveyed said goods and chattels to the defendant,, by way of chattel mortgage to secure a certain indebtedness then due and owing to said from said, which said indebtedness remained fully unpaid and unsatisfied at the time of the levying of said writ of replevin, and which chattel mortgage remained wholly unpaid from the time of the execution thereof until the levying of said writ of replevin; that this defendant,, replevined said goods and chattels for the purpose of foreclosing said goods and chattels and for no other purpose; that he foreclosed said chattel mortgage according to the stipulations thereof within a reasonable time after replevying said goods and chattels, to wit, on the same day; that upon such foreclosure, said goods and chattels were sold, according to the terms of said chattel mortgage and on such foreclosure sale, said goods and chattels were sold for less than

the sum of dollars, to wit, for the sum of dollars; that the sum for which said goods and chattels were sold at the said foreclosure sale, together with the value of all the other personal property of said in addition to said goods and chattels covered by said chattel mortgage was less than the sum of dollars, to wit, the sum of dollars; and this the defendants are ready to verify, wherefore, etc.

1808 Non damnifications, plea (Ill.)

That the plaintiff ha.. not at any time since the making of the said writing obligatory and the conditions thereto annexed been in any wise damnified by reason of anything in said condition of the said writing obligatory contained. And these defendant.. further aver that all the costs of said replevin suit were, before the commencement of this action, paid by the.. defendant.. to the said plaintiff.., and these defendants were released and discharged therefrom; and this the.. defendant ready to verify; wherefore, etc.

Replication

That he has been damnified by a breach of the conditions of said writing obligatory in an amount equal to the value of the goods and chattels in the declaration mentioned and in addition to the costs alleged by the defendants to have been paid; and of this plaintiff puts himself upon the country, etc.

1809 Right of property in defendant, plea (Ill.)

That the merits of said replevin suit were not determined in said action of replevin, and that the right of property in and to the said goods and chattels at the time of the execution of said writing obligatory and at the time of the replevying of said goods as alleged in said declaration, was in the defendant..,, and not in the plaintiff; and this the defendant.. ready to verify, wherefore, etc.

Replication

That the goods and chattels in the said declaration mentioned at the time, when, etc., were the goods of in manner and form as the said, for the use aforesaid, hath in his declaration above alleged; and this he prays may be inquired of by the country, etc.

1810 Title in mortgagee, plea (Ill.)

That the merits of said replevin suit were not determined in said action of replevin, and because at the time of the

replevying of said goods and chattels the right of property in and to said goods and chattels was in one and not in the plaintiff., and that said had before the commencement of said replevin suit conveyed said goods and chattels to the defendant.,, by way of chattel mortgage to secure a certain indebtedness then due and owing from said to said, which said indebtedness remained wholly unpaid and unsatisfied at the time of the levying of said writ of replevin, and which chattel mortgage remained in full force and effect from the time of the execution thereof until the levying of said writ of replevin; and this the defendant.. ready to verify; wherefore, etc.

1811 Set-off, plea (Ill.)

That the said plaintiff before and at the time of the commencement of the suit, to wit, at the county and circuit aforesaid was and still is indebted to the said defendant in a large sum of money, to wit, the sum of dollars lawful money of the United States for work and labor, care and diligence and attendance of said defendant by the said defendant and his servants before that time done, performed and bestowed in and about the business of the said plaintiff and for the said plaintiff and at his request; and for divers materials and other necessary things, by the said defendant before that time found and provided and used and applied in and about the said work and labor for the said plaintiff and at his like request; and for divers goods, wares and merchandise sold and delivered by the said defendant to the said plaintiff at his like request; and for money by the said defendant before that time lent and advanced to, paid out and expended for, the said plaintiff and at his like request; and for money by said plaintiff before that time had and received to and for the use of the said defendant; and for money due and owing from the said plaintiff to the said defendant, for interest upon and for the forbearance of divers large sums of money due and owing from the said plaintiff to the said defendant and by the said defendant forborne to the said plaintiff for divers long spaces of time before then elapsed; and for money due and owing from the said plaintiff to the said defendant upon an account stated between them: which said sums of money so due and owing to the said defendant exceed the damage sustained by the said plaintiff by reason of the non-performance by the said defendant of the said several supposed promises and undertakings in the said declaration mentioned and out of which said sum of money so due and owing from said plaintiff to said defendant the said defendant is ready and willing and hereby offers to set off and allow to the said plaintiff the

full amount of the said damages according to the form of the statute in such case made and provided. And this the said defendant is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, etc.

1812 Statutory penalty, informer's benefit

The imposition of a penalty for a violation of a public statute cannot be resisted on the ground that the informer would reap a benefit from the penalty, if he did not induce or advise the commission of the crime, but merely created the conditions under which the offense was committed.⁸¹

1813 Suretyship, pleading

The defense of suretyship must be specially pleaded or noticed.⁸²

1814 Taxes, over-valuation

In an action of debt by the state to enforce the payment of a tax the over-valuation of the property assessed is no defense to the suit.⁸³

1815 Technical breach, plea (Ill.)

And for a further plea in this behalf, as to any damages by reason of the said supposed breach of the said condition of the writing aforesaid, except as to the sum of one cent, the defendant.. say.. that the plaintiff ought not to have ..h.. aforesaid action against ..h.., the defendant.., to recover any greater damages than that sum, because they say, *that after the recovery of the said judgment by the said plaintiff.. in said declaration mentioned, the plaintiff.. caused execution to issue thereon, and placed the same in the hands of the sheriff of said county, to wit, before the commencement of this suit; and that said sheriff thereupon and before the commencement of this suit, under and by virtue of said execution levied upon certain lands of the defendant.., said lands being worth greatly in excess of said judgment, and that said levy is now in full force and effect.

**And this the defendant.. ready to verify; wherefore, ..h.. pray.. judgment if the plaintiff ought to

⁸¹ People v. Hartford Life Ins. Co., 252 Ill. 406.

⁸³ People v. Hibernian Banking Ass'n, 245 Ill. 528.

⁸² Field v. Plummer, 75 Mich. 437 (1889).

have.. h.. aforesaid action to recover against...h...., the defendants, any greater damages than the said sum of one cent, in this behalf, etc.

GENERAL ISSUE

GENERALLY

1816 Nil debet

A plea of *nil debet* is not the appropriate plea to an action of debt against sureties upon an administrator's bond,⁸⁴ nor is this plea pleadable to an action on a foreign judgment.⁸⁵ The validity of a statute upon which an action of debt is based may be questioned under a plea of *nil debet*.⁸⁶

1817 Non assumpsit

A plea of *non assumpsit* is inappropriate to an action of debt.⁸⁷

1818 Words and phrases

The words "is not indebted" are equivalent to "does not owe," in a plea of *nil debet*.⁸⁸

FORMS

1819 District of Columbia

For a plea to plaintiff's declaration defendant says that it never was indebted as alleged.

By executor

⁸⁹That the said was not in his life time indebted as is in said declaration alleged.

1820 Illinois and West Virginia

That he does not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff has above complained against him; and of this the defendant puts himself upon the country, etc.

⁸⁴ McDonald v. People, 222 Ill. 325, 328 (1906).

⁸⁵ Chipps v. Yancey, *supra*.

⁸⁶ Chicago v. Schmidinger, 243 Ill. 167 (1909).

⁸⁷ Harlow v. Boswell, 15 Ill. 56 (1853).

⁸⁸ Miller v. Blow, 68 Ill. 304, 309 (1873).

⁸⁹ Commence as in preceding form.

1821 Mississippi

That he is not indebted to plaintiff in manner and form as is alleged in the declaration.

VERDICT

REQUISITES

1822 Debt and damages

In an action of debt the verdict need not specify what part of the amount is debt and what is damages if it merely finds the part of debt due, without any damages.⁹⁰ A verdict finding damages alone is good in substance, but not in form.⁹¹

1823 Penalty, amount

In Illinois, the jury may fix the amount of the penalty in an action of debt for a statutory penalty.⁹²

FORMS

1824 Illinois

We, the jury, find the issues for the plaintiff; we find the debt to be dollars, and we assess the plaintiff's damages at dollars.

1825 West Virginia

We, the jury, upon the issue joined in this cause, find for the plaintiff in the sum of dollars being the debt in the declaration mentioned, including principal and interest thereon due.

.....
Foreman.

JUDGMENT

1826 Default, partial

If a plea fails to answer part of the indebtedness, it is appropriate to enter an interlocutory judgment by default for that part of the debt which is unanswered, and to take issue on the other part of the plea.⁹³

⁹⁰ *Lucas v. Farrington*, 21 Ill. 31 (1858).

⁹¹ *Italian-Swiss Agricultural Colony v. Pease*, 194 Ill. 98, 107 (1901); *Bodine v. Swisher*, 66 Ill. 536 (1873) overruled.

⁹² *People v. Hartford Life Ins. Co.*, 252 Ill. 398, 406 (1911).

⁹³ *Lucas v. Farrington*, *supra*.

1827 Judgment, requisites

In an action of debt generally it is not necessary to specify in the judgment what part is debt and what part is damages where the verdict finds only a part of the debt.⁹⁴ Under Illinois practice, a judgment in debt for damages alone is not substantially defective and the formal defect is waived if it is not made the subject of an objection in apt time.⁹⁵ A party may recover less than he declares for.⁹⁶ In actions upon penal bonds, a judgment for plaintiff must be in two amounts, first, for the amount of the penalty as debt, and the other such a sum as may be found as damages, the debt to be discharged upon the payment of the damages.⁹⁷

1828 Judgment, form (Miss.)

This day the above styled cause coming on for hearing and plaintiff being in open court announced ready for trial and defendant and his counsel being called came not; thereupon a jury of twelve good and lawful men being empaneled to well and truly try the issue joined, consisting of and eleven others. Who after hearing the evidence retired to consider of their verdict; and presently return into open court a verdict for the plaintiff in the sum of dollars. It is therefore considered by the court that do have and recover of and from the sum of dollars and all costs, for which let execution issue.

Dated, etc.

SUGGESTION OF FURTHER BREACHES

1829 Assignment, nature

The assignment of additional breaches in a bond is in place of a *scire facias* upon a judgment and is not a new proceeding but a continuation of the original action.⁹⁸ In an action upon a penal bond the plaintiff may assign, under the statute further

⁹⁴ Lucas v. Farrington, *supra*.

⁹⁵ Bowden v. Bowden, 75 Ill. 111, 112 (1847); Sec. 77, Practice act 1907.

⁹⁶ Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 386.

⁹⁷ Freeman v. People, 54 Ill. 153, 154 (1870); Patrick v. Rucker, 19 Ill. 439.

⁹⁸ People v. Compher, 14 Ill. 447 (1853).

breaches for any damages sustained after the suit has been brought.⁹⁹ Any breach of the condition of the obligation for which damages have not already been assessed, constitutes a proper subject matter of a new assignment.¹⁰⁰

⁹⁹ *Dent v. Davison*, 52 Ill. 109, 112 (1869).

¹⁰⁰ *People v. Compher*, 14 Ill. 455.

CHAPTER XXVI

DETINUE

IN GENERAL

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 1830 Action, maintenance
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- 1833 Virginia
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- 1835 Virginia
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- 1842 Allegations, nature
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SPECIAL CAUSES AND DECLARATIONS

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 1844 Bailment, Narr.
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SPECIAL DEFENSES, PLEAS, ETC.

- 1848 Pawn or pledge, pleading
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GENERAL ISSUE

- 1850 Generally
 1851 District of Columbia
 1852 West Virginia

VERDICT

- 1853 Value of property
 1854 Forms

JUDGMENT

- 1855 Generally
 1856 Form

IN GENERAL

1830 Action, maintenance

The action of detinue is maintainable for the wrongful detainer of specific goods or chattels against a person who has the actual possession of the property and who acquired it by lawful means, as by bailment, delivery or finding. The gist of the action is the wrongful detainer.¹ The owner of the absolute or general property in a specific thing, who has a right to its immediate possession, may bring detinue, although he has never had the actual possession of the thing sought.²

¹ Wiard v. Semken, 2 App., D. C. 424, 426, 428 (1894).

² Robinson v. Peterson, 40 Ill. App. 132, 135 (1890).

1831 Illinois

The action of detinue, although unusual, may still be resorted to in Illinois, and is preferable whenever a party is unable to proceed by replevin on account of his inability to furnish a replevin bond.³

1832 Michigan

The action of detinue has been abolished in Michigan.⁴

AFFIDAVIT**1833 Virginia**

⁵This day personally appeared before me in and for the county aforesaid, in the state of Virginia who made oath before me in my county aforesaid that he is the agent of the plaintiff in the above entitled action in detinue and that the property hereinafter described for the recovery of which this action of detinue is brought will be destroyed, or materially damaged or injured by the neglect, abuse or otherwise, if permitted to remain longer in possession of the defendant, or other person claiming under him; that the kind, quantity and value of the property claimed by the said plaintiff is as follows: (Give description of each item, etc.); and that he, the said affiant verily believes the said plaintiff is entitled to recover the same.

Given under my hand this day of 19...

.....
Notary Public.

1834 West Virginia

(Venue)

..... president and agent of the plaintiff in the above styled action pending in said circuit court, this day personally appeared before the undersigned, the clerk of the circuit court of said county, and being sworn, made oath and says that the said plaintiff claims in said action about feet of inch boards of oak lumber stacked at West Virginia, near, of the value of dollars; and affiant further says that he firmly believes that plaintiff is entitled to recover said property in said action.

Taken, etc.

.....
..... Clerk.

³ Robinson v. Peterson, *supra*.
⁴ (10,399) C. L. 1897.

⁵ See Section 211, Note 60.

b

....., being duly sworn says, that he is one of the plaintiffs named in the above entitled cause; that the plaintiffs have brought the above named action against the said and, under the name of, joint contractors, for the recovery in specie of the property therein sued for, and that the said property consists of railroad ties and sawed timber, amounting to about feet, sawed and piled up in order on, in the said county, state of West Virginia; and that the value of said property claimed by said plaintiffs in said action is dollars (\$.....). And the affiant says that he verily believes that the said plaintiffs in said action are jointly entitled to recover the said property therein described.

Taken sworn to and subscribed, before me the undersigned authority this day of, 19..

.....
Clerk.

BOND

1835 Virginia

Know all men by these presents, that we are held and firmly bound unto in the sum of dollars, to the payment whereof we bind ourselves, our heirs and personal representatives, jointly and severally, firmly by these presents. Witness our hands and seals this day of, 19... We hereby waive the benefit of our homestead exemptions as to this obligation.

The condition of the above obligation is such, that whereas has made affidavit, that in a certain action of detinue, now pending in the court of the of, wherein the said plaintiff and defendant, for the recovery of of the value of and that there is good reason to believe that the said defendant insolvent, and that the said will be sold, removed, secreted, or otherwise disposed of by the said defendant or agent so as not to be forthcoming to answer the final judgment of the court, or

will be destroyed or materially damaged or injured by neglect, abuse or otherwise, if permitted to remain in the possession of the said defendant., or other persons claiming under And said plaintiff in said action about to sue out a process of seizure. Now, if the said shall pay all such costs and damages as may be awarded against in said action, or sustained by any other person by reason of the seizure of said property, and also have the said property forthcoming to answer any judgment or order of the court respecting the same, then this obligation to be void; otherwise to remain in full force and virtue.

Executed in the presence of

(Signatures and seals)

In the clerk's office of the court, of the of justified on oath, before me, clerk of the court of the of , in my office, as to the sufficiency of estate as securit.... to the above bond, exclusive of homestead exemption, this the day of 19...

....., Clerk.

1836 West Virginia

Know all men by these presents, that we, and , principals and company, security, are held and firmly bound unto and , in the just and full sum of dollars (\$.....) to the payment whereof, well and truly to be made to the said and , we obligate and bind ourselves, our heirs, executors, and administrators, jointly and severly firmly by these presents, sealed with our seals and dated this day of , 19...

The condition of the above obligation is such, that whereas, the above bound and having commenced an action of detinue in the circuit court of county, West Virginia, against and , for the recovery of certain sawed lumber in the form of cross ties and sawed lumber, of the value of dollars (\$.....); and whereas, the said and desiring the immediate possession of said property, have filed the affidavit of the said before the clerk of the said circuit court, as provided by law, so as to obtain an order directing the sheriff of said county to seize and take into his possession, the property mentioned in the summons in this action, and turn the same over to the plaintiffs.

Now, therefore, if the above bound and shall pay all the costs and damages which may be awarded against them, or sustained by any person by reason of such suit, and will have the said property so claimed by them forthcoming to answer any judgment, or the order of said circuit court, respecting the same made at any time during the pendency of the action, then this obligation to be void; else to remain in full force.

..... (Seal)
By (Seal)
its attorney in fact.

State of West Virginia, county, to wit:

I,, a notary public in and for the said county, do certify that personally appeared before me in my said county, and being by me duly sworn, did depose and say that he is the attorney in fact of the company, the corporation described in the writing above, bearing date the day of, 19.., authorized by said corporation to execute and acknowledge deeds and other writings of said corporation and that the seal affixed to said writing is the corporate seal of the said corporation, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And said acknowledged the said writing to be the act and deed of said corporation.

Given under my hand this day of, 19..

.....
Notary Public.

WRIT

1837 Virginia

The commonwealth of Virginia, to the sheriff of the county of, greeting:

Whereas a suit has been instituted in our court of the county of by against in detinue to recover the possession of the following personal property, to wit: (Describe each article and give its value).

And the plaintiff having made the affidavit and given the bond required by section 2907 of the Code of Virginia (edition of 1887) you are therefore required to take the said property immediately into your possession and hold the same until further directed by the court, or the defendant has given bond for its restoration to him. And how you have executed this writ make return to the court on the first day of its next term. And have then and there this writ.

Witness, etc.

Return

Executed by taking possession of the within described property by virtue of the within writ this day of; and a forthcoming bond having been given by the defendant, the within described property is this day of released to the defendant subject to the further order of the court.

..... Deputy.
for Sheriff.

1838 West Virginia

State of West Virginia,

To the sheriff of county, greeting:

Whereas an action of detinue is now pending in the circuit court of said county, wherein partners in trade under the firm name and style of are plaintiffs and are defendants, for the recovery of feet of sawed lumber in the form of cross ties and sawed lumber of the value of dollars and the said plaintiffs, being desirous to have the immediate possession of the same and having filed with me the affidavit and bond required by law, you are hereby ordered in the name of the state of West Virginia, to seize and take into your possession the said sawed lumber and cross ties now on sticks at in said county.

Witness, etc. (clerk)

Return

Served the within writ, on the within named on the day of, 19.., by delivering to the said in person an office copy thereof; and on the same day and date did execute the above writ by seizing and taking into possession the sawed lumber and ties mentioned and described in said writ, at about o'clock ... M.

SUMMONS

1839 Virginia

In Virginia, a summons in detinue does not differ from any other summons except that it contains a description of the property with the value of each item as is alleged in the affidavit.

1840 West Virginia

State of West Virginia.

To the sheriff of county, greeting:

We command you that you summon and, if they be found in your bailiwick, to appear before the judge of our circuit court for the county of

at rules to be held in the clerk's office of said court, on the first Monday in next, to answer company, a corporation, of a plea of detinue for the recovery of about feet of inch boards of oak lumber stacked near the depot of the, at, West Virginia, of the value of \$. damages \$. And have then there this writ.

Witness the clerk of our said court, at the court house of said county, on the day of, 19., and in the year of the state.

....., Clerk.

Order for seizure

To the sheriff of county, state of West Virginia:

The plaintiff having made affidavit and given bond as required by law, which entitles it to the possession of the property in the summons mentioned and described, you are hereby commanded in the name of the state of West Virginia to seize and take said property into your possession.

Dated this, 19...

....., Clerk.

Return

Executed the within summons by seizing and taking charge of the property herein described on, 19...

(Signature)

b

Executed the within summons on the within named by tacking a true office copy of the same on the front door of his residence it being his usual place of abode in county, West Virginia, on, 19.. He not being then and there found and no member of his family over the age of sixteen years being found there.

(Signature)

c

Executed the within summons on the within named by delivering to him a true office copy of the same in county, West Virginia, on, 19..

..... Deputy,
..... for Sheriff,
..... county.

COUNTER BOND

1841 West Virginia

Know all men by these presents, that we, and obligors for and on behalf of, are held and firmly bound unto the company, a corporation, in the just and full sum of dollars, to

the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this day of, 19...

The condition of the above obligation is such, that whereas, in the law cause of the, a corporation, v., and others an action of detinue was to recover a certain lot of lumber in the declaration described; and whereas the plaintiff gave bond in double the value thereof in order to get possession of said property; and whereas the said, one of the defendants, desires to give this counter bond and take possession of the property mentioned and described in the same.

Now, therefore, this obligation witnesseth that if the said and, obligors for and on behalf of, shall pay all costs and damages which may be sustained by any person by reason of the return of said property to him and to have the property forthcoming to answer any judgment or order of the court, then this obligation to be void; else to remain in full force and virtue.

(Seal)

(Seal)

Signed, sealed and acknowledged, before me, this day of, 19...

....., Notary Public.

Approved by me., Clerk.

DECLARATION REQUISITES

1842 Allegations, nature

In a declaration for detinue, the allegations of bailment and finding are mere matters of inducement, and are not traversable.⁶

1843 Description

The description of the things demanded must be specific and accurate in a detinue declaration.⁷

SPECIAL CAUSES AND DECLARATIONS

1844 Bailment, Narr. (District of Columbia)

The plaintiff,, complains of the defendant,, that he render to her a chattel of the value of dollars, which he unjustly detains from her.* For that whereas, heretofore, to wit, on, at the city of, District of Columbia, the said plaintiff delivered to the defendant a certain chattel of her, the said

⁶ Wiard v. Semken, 2 App., D. C. 427.

⁷ Felt v. Williams, 1 Scam. 206 (1835).

plaintiff, to wit, a diamond locket, of the value of \$., to be redelivered to the said plaintiff whenever the same should be required. ** Nevertheless the said defendant, although he was afterwards, to wit, on the day of, 1. . . , requested by the plaintiff so to do, hath not as yet delivered the said chattel to said plaintiff, but so to do hath hitherto wholly refused, and still refuses and still unjustly detains the same from the said plaintiff; and the plaintiff claims a return of said chattel, or its value, and dollars for its detention; and therefore she brings her suit, etc.

1845 Cash register, Narr. (Va.)

The company, a corporation, plaintiff complains of the company, a corporation, and, trustees of the company, a corporation duly organized and existing under and by virtue of the laws of the state of Virginia, defendants, who have been summoned to answer a plea that they render to the plaintiff two (2) certain cash registers, numbers and, the property of it the said plaintiff of great value, to wit, of the value of (\$) dollars, which from the said plaintiff, the said defendants unjustly detain.* And thereupon the said plaintiff saith that heretofore, to wit, on the day of, 19. . , at the city aforesaid, it, the said plaintiff, delivered to the defendants the said cash registers numbers and, the property of the said plaintiff of great value, to wit, of the value of (\$) dollars, to be re-delivered to the said plaintiff by the said defendants when they the said defendants should be thereunto afterwards requested.** Nevertheless, the said defendants although they were afterwards, to wit, on the day of, 19. . , in the city aforesaid requested by the said plaintiff so to do, hath not as yet delivered the said cash registers numbers and to the said plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, and still unjustly detain the same from the said plaintiff, viz., at the city aforesaid, to the damage of the said plaintiff of dollars. And therefore it brings its suit.

1846 Gaming, action

The action of detinue lies to recover money, goods or other valuable thing lost, paid or delivered to winners at gaming.⁸

1847 Lumber, Narr. (W. Va.)

., a corporation, complains of and, of a plea that they render unto the said plain-

⁸ Sec. 132, Criminal Code (Ill.).

tiff certain goods, chattels and lumber, of the said plaintiff of great value, to wit, of (\$.....) dollars, which they unjustly detain from it.

For this, to wit, that heretofore, to wit, on the day of, 19.., the said plaintiff delivered to the said defendant certain goods, chattels and lumber, to wit: (Describe property and its location), all of which lumber was of the aggregate value of (\$.....) dollars and was to be delivered by the said defendants to the said plaintiff when they, the said defendants, should be thereunto afterwards requested; yet the said defendants, although they were afterwards, to wit, on the day of, 19.., requested by said plaintiff so to do, have not as yet delivered the said goods, chattels and lumber or any of them or any part thereof unto the said plaintiff who is entitled to recover the same, and has the present right of possession, but have hitherto wholly neglected and refused and still do neglect and refuse to do so, and still wrongfully and unjustly detain the same from the plaintiff, to the damage of the said plaintiff of (\$.....) dollars. And therefore it institutes this action of detinue.

SPECIAL DEFENSES, PLEAS, ETC.

1848 Pawn or pledge, pleading

The pawning or the pledging of goods sought to be recovered in the action of detinue, for money which has not been repaid, must be specially pleaded.⁹

1849 Pawn or pledge, plea (D. C.)

And for a further plea to the said declaration the defendant says that the said chattel was by the plaintiff, who then had possession thereof, pledged with him on or about the day of, 19.., as security for the debt of her then husband, which debt still remains unpaid.

Replication

The plaintiff, as to so much of the defendant's plea as pleads a pledge of said chattel by plaintiff to defendant, says that plaintiff was induced to make said alleged pledge by the fraud of the defendant.

GENERAL ISSUE

1850 Generally

The general denial or general issue in an action of detinue is *non detinet*. A plea of not guilty is inappropriate in this form

⁹ Wiard v. Semken, 2 App., D. C.
429.

of action. *Non detinet* puts in issue, at common law, the allegations of the plaintiff's property or possession and defendant's withholding the chattels sued for.¹⁰ Proof that the goods, in question, are not the plaintiff's property may be given under the plea of *non detinet*.¹¹

1851 District of Columbia

And for a plea to the said declaration the defendant says that he does not detain the said chattel from the plaintiff in manner and form as in the said declaration is alleged.

1852 West Virginia

And the said defendants, by their attorneys, come and defend the wrong and injury, when, etc., and for plea saith that they doth not detain the property, goods and chattels in the said declaration specified, or any or either of them, or any part thereof, in manner and form as the said plaintiffs hath thereof complained against them, and of this the said defendants put themselves upon the country, etc.

VERDICT

1853 Value of property

In detinue the verdict should ascertain the value of the property.¹²

1854 Forms (Va.)

We, the jury, find for the plaintiff the following articles sued for, as follows: (Give each item of the articles and its value), making the aggregate value of dollars.
..... Foreman.

(West Virginia)

We, the jury, find for the plaintiff the lumber in its declaration described and fix the value of each stack or pile of lumber therein described as follows: stack or pile therein described number containing feet, we value at \$. (Proceed with the other stacks in the same manner) of the aggregate value of \$.¹³
..... Foreman.

¹⁰ Robinson v. Peterson, *supra*.

¹¹ Wiard v. Semken, *supra*.

¹² Stirling v. Garritee, 18 Md. 468, 474 (1862).

¹³ West Virginia Timber Co. v. Ferrell, 67 W. Va. 14 (1910).

JUDGMENT

1855 Generally

In an action of detinue the judgment is to recover the identical thing itself, or its value, if the thing cannot be restored.¹⁴

1856 Form (Va.)

This day came the parties, by their attorneys, and by consent of all the parties the plaintiff filed its declaration, and by like consent said corporation pleaded *non detinet*, to which plea the plaintiff replied generally, and by like consent said and, trustees, pleaded *non detinet*, to which plea the plaintiff replied generally, and by consent of all parties this cause was docketed and at once submitted to court for trial without a jury; and the court having heard the evidence and argument of counsel is of opinion that said trustees took good title to both the cash registers claimed in the declaration in this action, as bona fide purchasers of the same without notice from the corporation, and that said trustees are not liable, but that said corporation is liable; therefore, it is considered by the court that said plaintiff recover of said corporation the cash registers in the declaration mentioned, of the value of \$......, the first mentioned of said cash registers number of the value of \$...... and the other of said cash registers number of the value of \$......; and if said cash registers, or either of them, cannot be had of said corporation that said plaintiff recover of said corporation the alternate value of such cash registers as cannot be had, the alternate value of each of said cash registers being fixed by the court at \$......; and it is further considered by the court that said plaintiff recover of said corporation its costs in this behalf expended; and it is further considered by the court that said plaintiff take nothing from the said and, trustees, but for its false claimer against said trustees in mercy be, and that said trustees recover against said plaintiff their costs in this behalf expended.

To which action and ruling of the court in overruling the plaintiff's motion to grant it a new trial, and in overruling the plaintiff's motion in arrest of judgment and in entering said judgment the plaintiff excepted and tendered this its bill of exceptions, which is signed, sealed, enrolled and ordered to be made a part of the record.

¹⁴ Felt v. Williams, *supra*.

CHAPTER XXVII.

EJECTMENT.

IN GENERAL

§§

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IN GENERAL

1857 Action, nature and scope

Ejectment was a personal action at ancient common law. It became a real action in the time of Henry VII.¹ This action is maintainable only when the title and the right of entry or possession are both in the claimant at the time of its commencement.² The estate in the lands must be sufficient to confer upon its claimant the right to immediate possession,³ although he is not bound to prove this right, where he can show a legal title to the premises.⁴ He must recover upon the strength of his own title, and not upon the weakness of his adversary's.⁵

A person who is in possession cannot maintain ejectment.⁶ Nor may ejectment be maintained against a person who is in the lawful possession of premises.⁷ But the action is appropriate against a person who claims the exclusive right of possession adverse to the lawful claimant.⁸

Unoccupied land is recoverable in ejectment from a party who claims merely title thereto.⁹

PARTIES

PLAINTIFF

1858 Generally

All persons who are interested in the premises must be made parties plaintiff to an action of ejectment.¹⁰

1859 Corporations, merger

The consolidated company alone, and not any of the constituent corporations, must maintain ejectment, under an act

¹ Ringhouse v. Keener, 63 Ill. 230, 233 (1872).

² Cobb v. Lavalle, 89 Ill. 331, 333 (1878); United Brethren Church v. Methodist Episcopal Church, 138 Ill. 608, 611 (1891); Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 166, 169 (1905); McFall v. Kirkpatrick, 236 Ill. 281, 292, 307 (1908).

³ Batterton v. Yoakum, 17 Ill. 288, 289 (1855).

⁴ Daniels v. Smith, 252 Ill. 222, 226 (1911).

⁵ Whitford v. Drexel, 118 Ill. 600, 604 (1886).

⁶ Chicago Terminal Transfer R. Co. v. Barrett, 252 Ill. 86, 94 (1911); Burke v. Carlinville Water Co., 176 Ill. 555, 556 (1898).

⁷ Sands v. Wacaser, 149 Ill. 530, 533 (1894).

⁸ North v. Graham, 235 Ill. 178, 187 (1908).

⁹ Converse v. Dunn, 166 Ill. 25, 28 (1897); Sec. 7, Ejectment act (Hurd's Stat. 1911, p. 967); Hanson v. Armstrong, 22 Ill. 442, 445 (1859).

¹⁰ Lowe v. Foulke, 103 Ill. 58, 59 (1882).

of consolidation which merges the titles of the different companies in the consolidated company.¹¹

1860 Heirs, abatement

Upon the death of the plaintiff, the action of ejectment, under Illinois practice, may be revived in the name of a portion instead of all of the heirs.¹²

1861 Lessee

The lessee, and not the landlord, must maintain ejectment for leased premises, the possession of which is wrongfully withheld by others.¹³

1862 Mortgagee and trustee

After condition broken, the mortgagee or trustee may maintain ejectment against the mortgagor or grantor and those claiming under him.¹⁴ A mortgagee can bring ejectment against the mortgagor only for condition broken.¹⁵ The trustee of an unexecuted trust who retains control of property until the trust is discharged, may maintain an action of ejectment.¹⁶

1863 Tenants in common

In Illinois, contrary to the common law rule, tenants in common may join as plaintiffs in an action of ejectment.¹⁷

DEFENDANTS

1864 Generally

The actual occupants and all other persons claiming title or interest to or in the premises, whether in privity with the occupant or not, must be made defendants to an action of ejectment to recover land which is actually occupied.¹⁸ Under prior

¹¹ Wiggins Ferry Co. v. Illinois & St. Louis R. & Coal Co., 163 Ill. 238, 242 (1896).

¹² Funk v. Stubblefield, 62 Ill. 405, 407 (1872); Sec. 14, Ejectment act; Sec. 16, Abatement act.

¹³ Gazzolo v. Chambers, 73 Ill. 75, 86 (1874); Cobb v. Lavalle, 89 Ill. 334.

¹⁴ Dean v. Gorton, 177 Ill. 624 (1899); Ware v. Schintz, 190 Ill. 189, 193 (1901).

¹⁵ Ladd v. Ladd, 252 Ill. 43, 48 (1911).

¹⁶ Chicago Terminal Transfer R. Co. v. Winslow, 216 Ill. 175, 176.

¹⁷ West Park Commissioners v. Coleman, 108 Ill. 591, 600 (1884); Sec. 5, Ejectment act.

¹⁸ Glos v. Swanson, 227 Ill. 179, 181 (1907); South Park Commissioners v. Gavin, 139 Ill. 280 (1891); Sec. 6, Ejectment act.

statute, the action could have been brought only against the occupant, thereby binding all parties in privity with him.¹⁹

1865 Corporations, religious

The religious corporation and not the persons who occupy the church property under its direction and employment, is the proper party defendant in ejectment.²⁰

1866 Motion to become party (Ill.)

²¹ And now comes and makes oath, and on said oath states that is the tenant of him, the said, and in possession of the land described in the declaration filed in said cause as such tenant.

Affiant further states that claims to be the owner of said premises, and that he claims his title through the will of deceased, and by deed from

Subscribed, etc.

1867 Suggestion of defendant's death and substitution (Ill.)

Now comes the plaintiff by his attorney, and suggests that heretofore, and on, to wit,, the defendant, died testate at in county, Illinois, and that in and by his last will and testament the said devised all his estate, both real and personal, including the tax titles involved in this suit, to his wife, who is a defendant herein and who has duly filed pleadings in said cause.

Wherefore, said plaintiff prays that said suit may be abated as to the said and that his said widow and devisee may be substituted for him as a party defendant, and that her pleadings heretofore filed herein in her own right may stand as her pleadings herein as such widow and devisee.

PRACTICE

1868 Law governing, construction

In an action of ejectment, the common law pleading and practice prevail except where, by statute, they are repealed expressly or by implication.²² The provisions of law regulating the prac-

¹⁹ Hanson v. Armstrong, 22 Ill. 442, 445 (1859).

²⁰ Chiniquy v. Catholic Bishop, 41 Ill. 148, 157 (1866).

²¹ See Section 211, Note 60.

²² Bowar v. Chicago West Division Ry. Co., 136 Ill. 101, 107 (1891); Aetna Life Ins. Co. v. Hoppin, 255 Ill. 115, 116 (1912); See. 10, Ejectment act.

tice of actions of ejectment will be given a liberal and not strict construction.²³

1869 Authority to sue, application for (Ill.)

And now come., the defendant., in the above entitled cause, by, ..h.. attorney., and moves the court for an order requiring the plaintiff.. attorney.. in said cause, to produce in open court and cause the same to be filed herein ..h.. written authority from plaintiff.. to sue in this cause; and for the purpose of this motion, said defendant.. offers the affidavit of hereto attached and made a part hereof, according to the statute in such case made and provided.

.....
Attorney.. for defendant..

Affidavit

(Venue)

..... being first duly sworn states that ..h.. (the defendant, or the duly authorized agent of the defendant) in the above entitled cause; that on day of 19., ..h.. served with summons in said cause; but that the said h.. not been served with proof, in any way, of the authority of the attorney.. in said cause to use the name.. of the plaintiff.. stated in the declaration filed herein; and that this affidavit is made in support of the motion or application to require said attorney.. to produce such authority.

.....
Subscribed, etc.

1870 Authority to sue, presumption

An attorney's authority to commence ejectment proceedings is presumptive evidence of that authority notwithstanding that it misnames the county wherein the suit is to be instituted.²⁴

1871 Demand of possession, necessity

A demand for possession is necessary before bringing an action of ejectment where possession of premises was acquired with the owner's assent. The demand is unnecessary where the entry was wrongful in its inception, or it has become so afterwards;²⁵

²³ Funk v. Stubblefield, 62 Ill. 407.

²⁴ Streat v. Lloyd, 128 Ill. 493, 495 (1889); Sec. 16, c. 45, Hurd's Stat. 1909, p. 945.

²⁵ Murphy v. Williamson, 85 Ill. 149, 151 (1877); Mapes v. Vandalia R. Co., 238 Ill. 142, 144, 145 (1909).

nor where there is a want of privity between the parties to the suit with respect to the premises sought to be recovered, each claiming under an independent and hostile title.²⁶

A notice to quit means the same as a demand for possession.²⁷

1872 Notice terminating ordinary lease (Ill.)

To

You are hereby notified that in consequence of your default in (State the character of the default) of the premises now occupied by you, being (Describe the premises) have elected to determine your lease; and you are hereby notified to quit and deliver up possession of the same to within (ten) days of this date.

(To be signed by the lessor or his agent) ²⁸

State of....., }
County of } ss.

..... being first duly sworn states, that ..h.. is (the lessor, or the duly authorized agent of the lessor named in the notice hereto attached); that he served said notice on the within named lessee,, by leaving a true copy thereof with (..... said lessee, or, a person of the age of over twelve years) at in said county and state, this day of, 19..

| | |
|--------------------|---------|
| Service and return | \$..... |
| Mileage | \$..... |
| Total | \$..... |

Subscribed and sworn to before me this day of 19...

.....
Notary Public.

Return by officer

Served the within notice on, the within named lessee, by leaving a true copy thereof with (said lessee, or a person of the age of over twelve years of age) at in said county and state, this day of, 19...

| | |
|--------------------|---------|
| Service and return | \$..... |
| Mileage | \$..... |
| Total fees | \$..... |

.....
(Official character)

²⁶ Harland v. Eastman, 119 Ill. 22, 26 (1886).

²⁷ Harland v. Eastman, *supra*.

²⁸ Sec. 9, c. 80 (Hurd's Stat. 1911, p. 1455).

1873 Notice terminating railroad lease (Ill.)

To railroad company:

Please take notice that you are hereby required to quit and deliver up possession of the premises which you now hold of the railroad company, situate in the city of on the first day of next, unless the current year of your tenancy shall expire before that day, in which case you are hereby required to quit and deliver up possession of the said premises at the end of the current year's tenancy, the railroad company having elected to terminate your tenancy at that time. The premises above referred to are the same which were leased to the railway company, by the railroad company, by lease dated of, 19.., and are described as follows: (Here insert description).

You are further notified that the railroad company will take the freight house upon said ground at the expiration of said tenancy, at its value, to be ascertained by appraisal, as provided in the lease hereinbefore referred to, and that said railroad company has selected chief engineer of the railroad, as one of the arbitrators to make such appraisal. By the terms of said lease, another arbitrator is to be selected by you, and you are requested to make such selection, and notify the railroad company thereof, as soon as conveniently may be. The tracks and other improvements upon the said premises, which the railroad company has, by the terms of the aforesaid lease, the option to take or not, at an appraisal of their value, will not be required by said company, and may therefore be removed by you, as provided in said lease.

..... company.
By President.

Dated, etc.²⁹

SUMMONS**1874 Illinois**

We command you to summon the company if they shall be found in your county, personally to be and appear before the court of said on the day of the next term thereof, to be holden at the court house in, in said county, on the first of, 19.., to answer unto in an action of ejectment to recover the possession of the following described premises, viz: (Set forth

²⁹ Baltimore & Ohio & Chicago R.
Co. v. Illinois Central R. Co., 137 Ill.
9, 20 (1891).

legal description) in the village of, and to the damage of the said plaintiff as he says in the sum of dollars.

And have you then and there this writ, with an endorsement thereon, in what manner you have executed the same.

Witness (clerk, etc.).

1875 Mississippi

State of Mississippi,

To the sheriff of county, greeting:

We command you to summon to appear before the circuit court of the county, district, to be held at the court house thereof in the city of, on the Monday of next, to answer to the complaint of, who demands of him the possession of (Set forth legal description of land).

And in default of his appearing and defending this action, judgment will be entered against him, and he will be turned out of possession of said land; and have you then there this writ.

Witness my hand and seal of office, this day of, 19...

..... Clerk.
....., D. C.

SPECIAL CAUSES OF ACTION

1876 Condemned property

Property which has been condemned but the present and future use of which has become impossible for the purpose for which it was taken, reverts to the original owner who may recover it in an action of ejectment.³⁰

1877 Judicial sale, purchaser, proof

The purchaser at an execution sale establishes a *prima facie* case against the defendant in execution by proving a valid judgment, an execution thereon, and a sheriff's deed to himself, without proving title from the government or a common source.³¹

1878 Right of way

A railroad company may be sued in ejectment to recover land used as part of its right of way.³²

³⁰ Bell v. Mattoon W. & R. Co., 245 Ill. 544, 550 (1910).

³² Mapes v. Vandalia R. Co., 238 Ill. 143.

³¹ Livingston v. Moore, 252 Ill. 447, 450 (1911).

1879 Tax title, possession, constructive

An action of ejectment is maintainable against persons who claim title under invalid tax deeds to unoccupied premises.³³ Seven successive years of possession together with color of title and payment of taxes are necessary to complete a tax title.³⁴ The rule that possession of a part of a vacant tract is possession of the whole tract, where possession is taken under the conveyance of the entire tract and improvements are made thereon, has no application to a portion of the same premises of which possession is held adversely at the time of the taking of possession of the other portion.³⁵

DECLARATIONS

1880 District of Columbia

The plaintiff.. sue.. the defendant.. to recover the (Insert legal description of land) in which said described premises plaintiff.. claim.. the fee simple title, and of which they were lawfully possessed, to wit, on the day of, 1..., when the defendant.. entered upon the same and unlawfully ejected the plaintiff.. therefrom.

And the plaintiff.. claim.. the possession of said piece.. or parcel.. of ground, with the improvements thereon and the appurtenances thereof, and the costs of this suit.

And the plaintiff.. further sue.. the defendant.. for money payable by the defendant.. to the plaintiff.. for that the defendant.. having as aforesaid ejected the plaintiff.. from the aforesaid premises, ha.., from the day and date aforesaid taken and received, and still continue to take and receive, the rents, issues and profits thereof, and to use, occupy and enjoy the said premises, to the damage of the plaintiff, dollars, which amount the plaintiff.. claim.. besides costs of this suit.

.....
Attorney for plaintiff...

1881 Florida

..... sues in an action of ejectment because the defendant is in possession of certain tracts and parcels of land situated, lying and being in said county, known and described as follows (Set forth legal description), containing about acres more or less; and the defendant has

³³ Phillips v. Glos, 255 Ill. 58, 60 (1912); Sec. 7, Ejectment act.

³⁴ Whitford v. Drexel, 118 Ill. 603;

Sec. 6, Limitations act (Hurd's Stat. 1911, p. 1493).

³⁵ Whitford v. Drexel, *supra*.

received profits on said land since the day of, 19.., of the yearly value of dollars, and refuses to deliver possession of said land to said plaintiff, or to pay him the said profits thereof. Wherefore, plaintiff sues and claims possession of said lands and *mesne* profits.³⁶

.....
Plaintiff's attorney.

ILLINOIS

1882 Parties, receivers

In suits against receivers, the declaration must allege the obtaining of leave of court in which the receiver was appointed to bring the action.³⁷

1883 Requisites generally

A declaration in ejectment must follow the statute.³⁸ The same form of declaration is required under the statute whether the suit is against the actual occupant of the premises, or it is against the party who is merely exercising acts of ownership on the premises claimed, or who is claiming title thereto or some interest therein and the premises are vacant and unoccupied.³⁹

1884 Vacant and unoccupied lands

In ejectment for vacant and unoccupied land, the declaration is sufficient if it avers that on some day after the title accrued, the plaintiff was possessed of the premises (Describing them) and that being so possessed, the defendant afterward on a date stated, entered into such possession and unlawfully withholds possession thereof to the plaintiff's damages, etc.⁴⁰

1885 Estate or interest, proof

Under former statute, a plaintiff was not permitted to recover an undivided interest, or an interest less than the whole under a claim of the entire property.⁴¹ But under present statute, a

³⁶ McKinnon v. Johnson, 57 Fla. 120 (1909).

³⁷ St. Louis, Alton & Springfield R. Co. v. Hamilton, 158 Ill. 366, 369 (1895).

³⁸ South Park Commissioners v. Gavin, 139 Ill. 288; Dickerson v. Hendryx, 88 Ill. 66, 68 (1878).

³⁹ Dickerson v. Hendryx, *supra*;

Glos v. Spitzer, 226 Ill. 82, 86 (1907).

⁴⁰ South Park Commissioners v. Gavin, *supra*.

⁴¹ Ballance v. Rankin, 12 Ill. 420, 421 (1851); Rupert v. Mark, 15 Ill. 540, 541 (1854); Murphy v. Orr, 32 Ill. 489, 492 (1863).

recovery may be had of a lesser interest than that claimed in the declaration. The amendment, however, is limited to the quantity and not to the duration of the estate to be recovered.⁴²

1886 Several interests and counts

Notwithstanding that it is contrary to the rules of pleading, in Illinois the declaration in ejectment may contain a single count in which several plaintiffs may rely upon a joint recovery; and it may also contain separate counts in which each plaintiff claims under a separate right of recovery of the whole or any undivided interest in the premises.⁴³

Therefore, the declaration must be specific with reference to the duration of the estate, but not concerning the quantity thereof or the particular kind of fee claimed. Thus, under a claim of the entire premises, less may be recovered;⁴⁴ and under an averment claiming in fee, the plaintiff may show title as mortgagee, which is merely a base or determinable fee.⁴⁵

1887 Amendment

A declaration in ejectment may be amended with respect to parties as well as description of the land sued for.⁴⁶

1888 Narr. claiming dower

For that whereas, heretofore, to wit, on the day of, 19.., the said plaintiff was possessed as of one undivided one-third on one undivided half of certain tracts of land situate in the said county of, and described as follows, to wit: (Insert legal description) in the said county of and state of Illinois, as and for her dower in the said lands as the widow of deceased.

And the said plaintiff being so possessed thereof the said defendant, to wit, on the same day and year last aforesaid entered into said premises and ejected the said plaintiff therefrom, and from the time last aforesaid, has unlawfully withheld, and does now unlawfully withhold from the said plaintiff, the possession thereof, to the damage of the plaintiff of dollars, etc.

⁴² *Almond v. Bonnell*, 76 Ill. 536, 539, 540 (1875); Sec. 12, Ejectment act (Ill.).

⁴³ *Funk v. Stubblefield*, 62 Ill. 406; Sec. 14, Ejectment act.

⁴⁴ *Almond v. Bonnell*, 76 Ill. 536.

⁴⁵ *Ladd v. Ladd*, 252 Ill. 46, limiting *Schumann v. Sprague*, 189 Ill. 425 (1901); Sec. 13, Ejectment act.

⁴⁶ *Strean v. Lloyd*, 128 Ill. 495; Sec. 39, Practice act 1907.

1889 Narr. general

For that whereas, heretofore, to wit, on the day of, 19.., the said plaintiff was possessed of a certain parcel or tract of land with the appurtenances thereto belonging lying in the county of in the state of Illinois, to wit: (Set out legal description), in the village of which said premises and tract or parcel of land the said plaintiff claims in fee.

And said plaintiff being so therefore possessed the defendant afterwards, to wit, on the day of, 19.., entered into said tenement and upon said tract or parcel of ground described above and ejected the said plaintiff therefrom and now unlawfully withholds from the said plaintiff the possession thereof, to the damage of the said plaintiff of dollars; and therefore he brings his suit, etc.

1890 Maryland

For that whereas the said heretofore, to wit, on the day of, 19.., was in possession at of all that parcel and land situate, lying and being in said and contained within the metes and bounds, courses and distances following, that is to say: beginning (Give legal description of land).

And the said did on the day of, in the year 19.., at aforesaid, wrongfully enter said parcel of land and eject h.. the said plaintiff therefrom and the said defendant ever since ha.. retained and still retain.. possession of the said lot or parcel of land; and other wrongs to the said then and there did to h.. great damage.

And the said claims the recovery of the said parcel of land, and for h.. damages, \$.

.....
Attorney for plaintiff.

To the defendant:

Take notice that an action of ejectment hath been commenced against you in the court of by the above named plaintiff.., by filing the declaration aforesaid, and that you are required to appear in the said court in person or by attorney, on the second Monday of, 19.., to make defense to said action, according to law; otherwise judgment will be recovered against you for the premises described in said declaration and you will be turned out of possession.

.....
Attorney for plaintiff.

Præcipe

| | |
|---|-------------------------|
| No. | Ct. |
| | |
| | Plaintiff. |
| | |
| v. | |
| | |
| | Defendant. |
| | |
| Mr. | |
| Clerk of the | court |
| of | |
| File this declaration and notice, issue summons thereon and send cop. of declaration and summons, under seal to the sheriff to be served on each of the defendant., or if .h. cannot be found, upon the person or persons in actual possession of the land described in the declaration; and if there be no person in possession of the premises, or if the same be unimproved, vacant property, a copy of the declaration and summons to be conspicuously posted and set up upon the premises. | |
| | |
| | Attorney for plaintiff. |
| Filed | day of 19.. |

Affidavit

Be it remembered, and it is hereby certified, that on this day of, 19.., personally appeared before the subscriber, a justice of the peace of the state of Maryland, in and for, the plaintiff.. in this action, and made oath in due form of law, that at the time of the service of the copy of the declaration in this cause, he, the deponent, was landlord of the premises in the said declaration mentioned, and that was tenant to him of the same premises, by virtue of a certain lease from and more than a half year's rent was, at the same time, due and in arrear to this deponent for the said premises; that this deponent had by a clause of re-entry in the said lease, power to re-enter upon the said premises for the non-payment of the said rent; and that no sufficient distress was to be found upon the premises, countervailing the rent then due.

..... J. P.

1891 Michigan; averments, possession or interest

In Michigan an averment of possession or interest limits the plaintiff to a recovery of that particular interest, and no other.⁴⁷

1892 Michigan, Narr.

For that whereas, the said plaintiff on the day of, 19.., was possessed of the following real estate and

⁴⁷ De Mill v. Moffat, 49 Mich. 125, 128 (1882).

premises, situate in the township, county of in the state of Michigan, and being known and designated as (Describe the land) which said premises the said plaintiff claims in fee. And he, the said plaintiff being so possessed thereof, the said defendant afterwards, to wit, on the day of, 19.., entered into said premises and ejected the said plaintiff therefrom and unlawfully withholds from said plaintiff the possession thereof, to the damage of said plaintiff of dollars; and therefore he brings suit, etc.

1893 Mississippi, Narr.

..... plaintiff in this action, by his attorney demands of defendant the possession of the following described land in said county and state, to wit, (Set forth legal description of property). And the plaintiff says that his right to the possession of the same accrued on day of, 19.., and that the defendant wrongfully deprives him of the possession thereof, to the damage of dollars. And the said plaintiff also demands of said defendant the sum of dollars for use and occupation of the said lands by the defendant from the aforesaid date.

1894 Virginia

For this, to wit, that heretofore, to wit, on the day of, 19.., the said plaintiffs were possessed for their joint lives, and the survivor of them for her life, of a certain lot or parcel of land situate, lying and being in the city of and the state of Virginia, bounded and described as follows, to wit, (Insert legal description) their said interest and estate in said lot or parcel of land having been created by and arising under the last will and testament of their deceased father who devised the same to them. And the said plaintiffs say, that being so possessed of the said lot or parcel of land, the said defendant afterwards, to wit, on the day of, 19.., entered the same, and unlawfully withholds from the said plaintiffs the possession thereof, to the damage of the said plaintiffs of dollars. And therefore they bring their suit.

Notice

To

You are hereby notified that the foregoing declaration in ejectment against you and each of you will be filed in the clerk's office of the court of on the day of, that being the first day of the rules

Bill of particulars

..... Dr.

To

To damages occasioned by loss of use of cer-
tain tracts of land, situate (Describe generally) from
to \$.....

1895 West Virginia

For this, to wit, that heretofore, to wit, on the day
of, 19.., the said plaintiff was possessed of an estate
in fee simple absolute, of a certain tract or parcel of land, lying
and being in the county of aforesaid, and con-
taining acres, and bounded and described as fol-
lows (Insert description).

And the said plaintiff says that being so possessed of said
tract of land, the said defendant afterward, to wit, on the
..... day of, 19.., entered into the same, and
that it unlawfully withholds from the plaintiff the possession
thereof, to the damage of the plaintiff of dollars.

.....

Notice

⁴⁸ To the company, a corporation incorporated and
doing business under the laws of the state of West Virginia:

You are hereby notified that the foregoing declaration in
ejectment against you will be filed in the clerk's office of the
circuit court of county, West Virginia, at rules
to be held for the said court on the Monday in the
month of, 19.., and if you fail to appear and plead
to said declaration, within the time required by law, judgment
will be given against you.

.....
Plaintiff.

.....
his attorney.

Service

Executed the within declaration in ejectment upon the
within named company, a corporation incorpo-
rated and doing business under the laws of the state of West
Virginia, on the day of, 19.., by delivering
on that day a copy thereof to, the person ap-
pointed by said corporation pursuant to law to accept service

⁴⁸ Sec. 3346, c. 90, Code 1906.

of process for it, in the county of, in the state of West Virginia, that being the county and state wherein the said resides.

Sheriff of county, West Virginia.

NOTICE TO DEFEND

1896 Notice to landlord (Ill.)

On the day of, 19..., a summons in ejectment, of which the following is a true copy, was served on me.

By virtue of the statute in such case made and provided, I hereby notify you of the institution and pendency of said suit, in order that you may govern yourself accordingly.

1897 Notice to guarantor of title (Mich.)

To and, (his wife), Michigan:

You will please take notice, that, has commenced suit in the circuit court for the county of, state of Michigan, against the company, a Michigan corporation, for the recovery of land, by declaration, in terms and tenor as follows: (Insert exact copy of the declaration).

Service of said declaration was made on the defendant, company on, 19... The company, as successor of the company, has this day filed with the clerk of the circuit court for the county of, a plea of the general issue to the said plaintiff's declaration, and has served the plaintiff,, with a copy of the same.

You are requested and urged to defend said suit under your covenant of warranty in your deed to the company, to which company said company is successor, of the premises described in said declaration. Said deed bears date, 19...

Dated, etc.

Yours, etc.,

By
its attorney.

SPECIAL DEFENSES, PLEAS, ETC.

1898 Pleading, generally

Under Illinois practice care must be taken to limit a plea to the particular defense it is intended to interpose.⁴⁹

⁴⁹ Dickerson v. Hendryx, 88 Ill. 68.

1899 Adverse possession, tacking

Privity of estate or title between successive disseizors depends upon possession, which must be by mutual consent and sufficient to exclude a constructive intervening possession of the true owner, and it does not necessarily depend upon record title.⁵⁰ Thus, two possessions are regarded as one, where a conveyance of land has been made by a description in a deed and the possession has been delivered of the entire enclosure by a grantor who had title by deed to a tract of land described in the deed and who also enclosed with it and was in possession of adjoining land to which he had no record title.⁵¹ Privity of estate or title is essential to authorize the joining or the tacking of successive possessions to make a continuous possession.⁵²

1900 Adverse possession, tenant at will

A tenant at will who becomes such upon the expiration of a leasehold may disclaim and disavow his tenancy and the title of his former landlord, and he may claim adversely thereto, without first surrendering possession of the premises, provided such landlord has notice of the disclaimer and disavowal by clear, positive and continued acts for the statutory period.⁵³

1901 Adverse possession, notice

Possession under an unrecorded deed is notice to all the world, except where the possession is continued by the same tenant after the unrecorded title passes without notice of the change.⁵⁴

1902 Adverse possession, pleading

Title by adverse possession may be shown in ejectment under the general issue.⁵⁵

1903 Adverse possession, notice with general issue (Mich.)

To the plaintiff:

Take notice that the defendant will show under the general issue above pleaded the following affirmative defenses: (1)

⁵⁰ Rich v. Naffziger, 255 Ill. 98, 103, 106 (1912).

⁵¹ Rich v. Naffziger, 255 Ill. 104.

⁵² Rich v. Naffziger, 255 Ill. 103, 106.

⁵³ Armstrong v. Wilcox, 57 Fla. 30, 33 (1909).

⁵⁴ Milligan v. Miller, 253 Ill. 511, 517 (1912).

⁵⁵ Miller v. Beck, 68 Mich. 76, 78 (1888).

The grantors of plaintiff had no title to convey; (2) the claimed lease between the plaintiff and was fraudulently obtained—there was nothing upon which to base the same—it was simply obtained in an attempt to get them to recognize some title in the plaintiff; (3) defendant has held said premises adversely for more than years; and (4) the said plaintiff could not hold title to said lands for railroad purposes and they are not used for railroad purposes and are not desired to be used for railroad purposes.

Dated, etc.

1904 Adverse possession, plea (Va.)

..... by her attorney, comes and says that, the defendant herein, is her tenant, and that she is the owner of the property in the declaration set out, in fee simple, and that the supposed causes of action in the declaration in this case mentioned, if it exists at all, did not accrue to the said plaintiffs at any time within fifteen years next before the commencement of this action in manner and form as the complainants have complained against the defendant, but that the said and those under whom she claims, have been in open and adverse possession of the property sued for in the declaration for a period of more than fifteen years prior to the institution of this suit.

And this the said is ready to verify.

.....p. d.

1905 Conveyance during pendency of action.

A conveyance of the premises by the plaintiff to a third party, pending the action of ejectment, does not defeat his right to a recovery, as the plaintiff's recovery will inure to the benefit of his grantee.⁵⁶

1906 Deed a mortgage, practice

Equitable defenses are not available in ejectment. If a deed which is relied upon for title was given to secure a debt, the remedy is by bill in equity to enjoin the ejectment suit and to show the true character of the instrument. After this has been done, the records in the chancery suit can be introduced in the ejectment proceeding to show the true character of the deed.⁵⁷

⁵⁶ Glanz v. Ziabek, 233, Ill. 22, 25 (1908).

⁵⁷ Ladd v. Ladd, 252 Ill. 47, 48.

1907 Demand of possession, pleading, proof

The omission to make demand for possession before the bringing of the action of ejectment must be specially pleaded by verified plea, or this defense is waived.⁵⁸

Proof of a demand made before bringing suit is unnecessary under the statute, where the general issue is the only plea pleaded.⁵⁹

1908 Demand of possession, plea (Ill.)

And for a further plea in this behalf to so much and such parts of the declaration of said plaintiff as allege that at or before the beginning of this suit the plaintiff made demand on this defendant for the possession of the tenements in said declaration described, this defendant says that said plaintiff ought not to have or maintain his aforesaid action against this defendant, because this defendant says that said plaintiff did not at or before the beginning of this suit, or at any time thereafter, make demand on him, this defendant, for the possession of the tenements in said declaration described, or any part thereof, in manner and form as the said plaintiff has above thereof complained against him, this defendant; and this the defendant is ready to verify; wherefore, etc.

(Venue)

....., being duly sworn upon his oath, says that he is one of the defendants named in the above entitled cause and that he has read the foregoing plea signed by him, denying demand of possession, and affiant says that said special plea is true.

Subscribed, etc.

1909 Estoppel in pais

An estoppel *in pais* is not available in ejectment, for the reason that such an estoppel is equitable and is enforceable in a court of equity alone.⁶⁰

1910 Fraud

A defendant may prove under the general issue, that the grantor in a deed is fictitious and that the instrument is fraudulent.⁶¹

⁵⁸ Timmons v. Kidwell, 138 Ill. 13 (1891).

⁵⁹ Carroll v. Rabberman, 240 Ill. 450, 453 (1909).

⁶⁰ Mills v. Graves, 38 Ill. 456, 466

(1865); Amboy v. Illinois Central R. Co., 236 Ill. 236, 243 (1908).

⁶¹ Phelps v. Nazworthy, 226 Ill. 254, 260 (1907).

1911 Judicial sale; defendant in execution, outstanding title

In an action of ejectment by the purchaser at a judicial sale, neither the defendant in the original action or proceeding nor any one claiming under him, can dispute the plaintiff's title;⁶² and this rule is applicable to husband and wife when they are in possession of the premises at the time the title is divested by the action or proceeding.⁶³ A defendant who abandons the premises after a judicial sale but afterwards returns to it, may show, in an action of ejectment by the purchaser at a judicial sale, an outstanding title, provided he has taken possession under it and he connects himself with it.⁶⁴

1912 Mortgage indebtedness

In ejectment by a mortgagee, the defendant under the general issue may show that there has been no default in payment, that the mortgage indebtedness has been satisfied, or that it is barred by the statute of limitations.⁶⁵

1913 Outstanding title

A defendant may defeat the action of ejectment by showing title acquired subsequently to the bringing of the suit.⁶⁶ The defendant may also show title in a third person, although he has no paper title.⁶⁷

1914 Possession and performance by vendee

Proof of possession under, and proof of performance of, a contract of purchase, on the part of the vendee, is a complete defense to an action of ejectment by the vendor, the vendor having the burden of proving a breach of the contract.⁶⁸

1915 Possession and title, pleading and practice

A defendant who desires to put in issue the question of his possession of the premises, or his claim of title or interest therein, must do so by special pleas verified by affidavit.⁶⁹ A plea of

⁶² *Hayes v. Bernard*, 38 Ill. 297, 298, 302 (1865).

⁶³ *Woods v. Soucy*, 184 Ill. 568, 573 (1900).

⁶⁴ *Hayes v. Bernard*, 38 Ill. 302, 303.

⁶⁵ *Ladd v. Ladd*, 252 Ill. 48.

⁶⁶ *North v. Graham*, 235 Ill. 178, 187 (1908).

⁶⁷ *Cobb v. Lavalle*, 89 Ill. 332.

⁶⁸ *Daniels v. Smith*, 252 Ill. 225.

⁶⁹ *Glos v. Spitzer*, 226 Ill. 85; *Glos v. Swanson*, 227 Ill. 181; *Dickerson v. Hendryx*, 88 Ill. 69.

not guilty is ineffectual to raise the question of possession or title in an action of ejectment.⁷⁰ But the want of title in the plaintiff may be raised at any time, even for the first time on appeal of error.⁷¹

A defendant may plead separately denying possession and disclaiming title or interest; but in doing so he must limit his plea to the particular defense interposed.⁷² In ejectment a defendant may put in issue his possession or title by verified rejoinder denying claim of interest or title, when the plaintiff replies averring that the defendant was sued because he claims some interest or title to the premises.⁷³

The absence of a verification to a plea denying possession or claim of title is cured by verdict, in a case which has been tried under the pleadings without making objection to the insufficiency of the plea.⁷⁴

1916 Possession, disclaiming, plea (Ill.)

That he was not in possession of the premises described in the declaration, or any part or parts thereof, at the time of the commencement of said action, nor has he since, nor was he for a long time prior thereto, to wit, years and upward in the possession of said premises or any part or parts thereof; and of this, etc.⁷⁵

1917 Rejoinder, second trial, practice

On a second trial of an action of ejectment under the statute, it is discretionary with the court to refuse or grant leave to file a rejoinder to a replication which should have been filed before the first trial, where there is no sufficient reason shown for the delay in making the application for the leave.⁷⁶

1918 *Res judicata* and *stare decisis*

The doctrine of *stare decisis* is applicable to ejectment cases tried a second time under the statute, although a former judgment of the reviewing court cannot be relied upon as *res judicata*.⁷⁷

⁷⁰ Phillips v. Glos, 255 Ill. 58, 60 (1912); Secs. 21, 22, c. 45, Hurd's Stat. 1911.

⁷¹ Wiggins Ferry Co. v. Illinois & St. Louis R. & Coal Co., 163 Ill. 243.

⁷² Dickerson v. Hendryx, 88 Ill. 68, 69.

⁷³ Glos v. Spitzer, 226 Ill. 86.

⁷⁴ Illinois Central R. Co. v. Noyes, 252 Ill. 178, 184 (1911).

⁷⁵ Add oath or verification.

⁷⁶ Glos v. Swanson, 227 Ill. 180.

⁷⁷ Weigel v. Green, 221 Ill. 187, 188 (1906).

1919 Statute of limitations

The barring of the indebtedness under the statute of limitations is a good defense to an action of ejectment upon a mortgage.⁷⁸

1920 Tax title

To establish the defense of seven years' possession under color of title acquired in good faith, with the payment of taxes, it is necessary that the premises in controversy or some portion thereof shall be covered by the color of title and that the possession and payment of taxes shall relate to the same land which is described in the instrument that constitutes the claim of color title.⁷⁹ The bringing of suit for the recovery of vacant and unoccupied land at any time before the expiration of the seven years required for the payment of taxes, destroys the right to claim under the limitation statute.⁸⁰

1921 Title, claiming, plea (Va.)

..... by her attorney, comes and says that she is the owner in fee simple of the property mentioned in this cause, and that, who is named as defendant herein is her tenant, holding said property by virtue of a lease from her; that the defendant herein is not guilty of unlawfully withholding the premises claimed by the plaintiffs in the declaration.

.....p. d.

1922 Title, disclaiming, plea (Ill.)

And for a further plea in this behalf to so much and such parts of the declaration of the said plaintiff as alleges that at the time of the commencement of suit this defendant did claim title or interest in the premises described in the declaration, the defendant says that he did not claim title or interest in the said premises described in said declaration at the time of bringing this suit; and this the defendant is ready to verify; wherefore, etc.

⁷⁸ Pollock v. Maison, 41 Ill. 516, 519 (1866).

⁷⁹ Chicago, Rock Island & Pacific Ry. Co. v. Hardt, 138 Ill. 120, 125 (1891); Sec. 6, Limitations act (Ill.).

⁸⁰ Converse v. Dunn, 166 Ill. 25, 28, 30 (1897); Sec. 7, Limitations act.

Replication

That the said defendant, did claim title and interest in said premises at the time of the commencement of said suit; (Conclude to the country).

1923 Trespasser, outstanding title

A trespasser who has taken possession without title will not be permitted to set up in ejectment an outstanding title in another;⁸¹ but the intruder may show that the plaintiff's title had expired, or that he purchased it after the action was commenced.⁸²

GENERAL ISSUE AND NOTICE

1924 Florida

And now comes the defendant and for a plea to the declaration says that he is not guilty.

1925 Illinois, not guilty, scope

A plea of not guilty in ejectment does not put in issue the question of possession by the defendant, or that he claims title or interest in the premises. Under such a plea, all that the plaintiff is required to prove to maintain the action is title in himself at the time of the commencement of the suit⁸³ and that the defendant claims the land from a common source, without proving the defendant's possession.⁸⁴ Unaccompanied by special pleas, a plea of not guilty admits the possession of the entire premises as they are described, defined and claimed in the declaration.⁸⁵

1926 Illinois, plea

And the defendant, by, its attorney, comes and defends the wrong injury, when, etc., and says that it is not guilty of unlawfully withholding the tenements in the said

⁸¹ *Anderson v. Gray*, 134 Ill. 550, 556 (1890).

⁸² *Hardin v. Forsythe*, 99 Ill. 312, 322 (1880).

⁸³ *Shumway v. Leturno*, 225 Ill. 601, 603 (1907); *Glos v. Spitzer*, 226 Ill. 85; *Murphy v. Williamson*, 85 Ill. 151; *Edwardsville R. Co. v. Sawyer*, 92 Ill. 377, 383 (1879); Secs. 21, 22, c. 45 (Hurd's Stat. 1911).

⁸⁴ *Dean v. Gorton*, 177 Ill. 625; *South Park Commissioners v. Gavin*, 139 Ill. 288; Sec. 22, Ejectment act.

⁸⁵ *Edwardsville R. Co. v. Sawyer*, *supra*; *Chicago, Rock Island & Pacific Ry. Co. v. Hardt*, 138 Ill. 123; Sec. 21, Ejectment act.

declaration mentioned or any part thereof, in manner and form as the plaintiff has above thereof complained against it. And of this the defendant puts itself upon the country, etc.

1927 Michigan, plea

In Michigan, the general issue in ejectment is the same as in personal actions.⁸⁶

1928 Michigan, notice

To

Take notice that in the trial of this cause the defendant will give in evidence and insist under the above plea of the general issue that the United States of America originally caused to be made a survey of a certain tract of land in the county of and state of Michigan now known and designated by reference to such survey as section (Describe same generally), and that in surveying and establishing the line of so much of said section as lies of it established the quarter-stake on said line at a point which is chains of of; that one, now deceased, late of the county of, in said state of Michigan became the purchaser of said United States of (Describe property), that the only occupation by said defendant of any land upon said section is within the boundaries above named, that his right to occupy such land he derives from one who is his landlord; and that the ownership of the premises so occupied by him is in said by a title originally derived through the said deceased.

1929 Mississippi, plea

And the said and by their attorney appear and defend this action and say that they are not guilty of the injuries whereof the said and have complained in their declaration; and of this they put themselves upon the country.

1930 West Virginia, plea

And the defendant for a plea says that it is not guilty in manner and form as the plaintiff in his declaration has alleged; and of this it puts itself upon the country.

.....
Defendant.

⁸⁶ (10,967), C. L. 1897.

PROOF

COMMON SOURCE OF TITLE

1931 Affidavit

(Venue)

..... being first duly sworn upon his oath says that he is the plaintiff in the above entitled cause and that he claims title to the premises described in the declaration in the above cause through a common source with the defendant, namely, through⁸⁷

Subscribed, etc.

1932 Counter affidavit, practice

Upon the plaintiff's filing of an affidavit claiming title through a common source, the defendant may either deny, under oath, that he claims title through the common source, or he may state on oath, that he claims title through a source other than or different from that specified in the plaintiff's affidavit; and this may be done by affidavit or some other evidence at the trial.⁸⁸

ABSTRACT OF TITLE

1933 Sworn copies, notice

To attorneys for certain parties as of record:

There is herewith delivered to you for your inspection sworn copies of original letter press copies of abstracts of title, which we propose to offer in evidence on the trial of the above entitled cause, as follows:

1. Copy from an original letter press copy of an abstract of title, made by containing grant dated, 19..., recorded in the recorder's office of county, Illinois, in book page from the state of Illinois, to et al., trustees of the, said letter press copy being verified by the affidavit of sworn to, 19...

.....
Attorney for plaintiff.

1934 Proof of service

(Venue)

..... being first duly sworn, on oath says that he served the annexed notice on, attorneys for, as appears by their acceptance of service upon

⁸⁷ This affidavit may be filed as part of the evidence in the case at the time of trial.

⁸⁸ Chicago, Rock Island & Pacific Ry. Co. v. Hardt, 138 Ill. 124; Sec. 25, Ejectment act.

the face of said notice, and that at that time this affiant left the copies in said notice mentioned, with said, for the space of one day, for examination; that he then left the said copies with said for examination for the space of hour, and was informed by said that said had examined the said copies.

Affiant further says that on the day of, 19..., he served the said notice on by leaving a copy of the same with said who refused to accept service upon the same; that affiant tendered said copies to said for examination, stating that he would wait until said had examined the same, but said informed affiant that he could not examine said copies at that time for the reason that he had too much work to do.

And further affiant saith not.

Subscribed, etc.

EVIDENCE

1935 Public records

At common law, certified copies of the records of the land office are admissible in evidence.⁸⁹

1936 Secondary evidence, affidavit

(Venue)

..... being duly sworn, deposes and says that he is the plaintiff in the above entitled cause; that the originals of the following described deeds and instruments in writing, relating to the lands in controversy in said cause and described in the declaration filed herein, viz.:

1. Grant from the state of Illinois to the Trustees of the Illinois and Michigan canal, dated and recorded in said county recorder's office,, 19..., in book of records, at page; (Enumerate other instruments or documents in similar manner), are lost or destroyed and are not within the power of this affiant to produce; and that the records thereof were destroyed by fire on or about⁹⁰

Subscribed and sworn, etc.

b

(Venue)

..... being first duly sworn, on oath says that he is one of the attorneys for the plaintiff herein, and her agent in this behalf.

⁸⁹ Wyman v. Chicago, 254 Ill. 202, 207 (1912).

⁹⁰ Spitzer v. Schlatt, 249 Ill. 416, 423 (1911).

Affiant further says that the originals of the following described deeds, conveyances, instruments and other writings, of and concerning the lands in question in this case, which were acknowledged and proved according to the laws of this state, and which by virtue of the laws of this state were entitled to be recorded, and which were recorded in the recorder's office of county, Illinois, are not, nor is any or either of them, in the power of the plaintiff to produce, in whose behalf it is desired to use the same on the trial of this suit.

And that to the best of affiant's knowledge said original deeds and other instruments were not, nor was any of them, intentionally destroyed or in any manner disposed of for the purpose of introducing a copy or copies thereof in place of the originals thereof respectively; and affiant further says that the records of all instruments hereinafter named, recorded prior to the day of, 19.., were destroyed by fire on or about said day of, 19...

And the said deeds and instruments hereinbefore mentioned are more particularly described as follows, to wit:

1. Grant from the state of Illinois to the Trustees of the Illinois and Michigan Canal, dated, 19.., recorded, in book page

(Specify other instruments in the same manner) ⁹¹

Subscribed, etc.

1937 Secondary evidence, verification

A reasonable opportunity to verify a sworn copy of an instrument to be used in evidence does not require the original to be submitted with the copy.⁹²

VERDICT

1938 Plaintiff (Ill.)

We, the jury, find the defendant guilty of unlawfully withholding the possession of the premises described in the plaintiff's declaration filed in this cause and that the right of the possession of said premises is in the plaintiff in fee simple.

.....

Foreman.

(And eleven other signatures)

(Virginia)

We, the jury, find for the plaintiff that he recover from the defendant possession of the tracts of land described and speci-

⁹¹ Wyman v. Chicago, 254 Ill. 206.

⁹² Wyman v. Chicago, 254 Ill. 208;
Par. 29, Hurd's Stat. 1911, p. 1892.

fied in the declaration as being situate (Describe same) and that he is entitled to the said parcels of land in fee simple; and assess the plaintiff's damages at (\$.....) dollars.

.....
Foreman.

1939 Defendant (Ill.)

We, the jury, find the defendant not guilty.

(Virginia)

We, the jury, on the issue joined, find a verdict for the defendant.

JUDGMENT

1940 Dismissal, practice

The plaintiff, in Illinois, has a right to dismiss his action of ejectment at any time before the rendition of a second verdict in a case which has been reversed and remanded by the supreme court for a new trial, as the granting of a new trial annuls the verdict for every purpose and confers the right to trial by jury *de novo*.⁹³

1941 Several judgments

In actions of ejectment brought by several plaintiffs claiming different interests, judgment may be rendered against some of the plaintiffs and in favor of some of the others.⁹⁴ The rule that all plaintiffs must recover or none, has no application to judgments in ejectment under Illinois practice.⁹⁵

1942 Tenants in common, effect

A judgment in ejectment in favor of tenants in common does not effect their respective interests, but leaves them to hold by several titles as before the action was brought.⁹⁶

1943 Costs, apportionment

The costs of suit should be apportioned between the parties, where the plaintiff recovers only a part of the land sued for.⁹⁷

⁹³ Aetna Life Ins. Co. v. Hoppin, 255 Ill. 115, 117 (1912); Sec. 70, Practice act 1907.

⁹⁴ Funk v. Stubblefield, 62 Ill. 407; Sec. 14, Ejectment Act.

⁹⁵ Funk v. Stubblefield, *supra*.

⁹⁶ West Park Commissioners v. Coleman, 108 Ill. 600; Sec. 30, Ejectment act.

⁹⁷ Daniels v. Smith, 252 Ill. 227.

1944 Appeal, separate

An appeal may be taken from a judgment as to one of several and distinct lots to which the questions of title are entirely independent of each other.⁹⁸

1945 Forms (Ill.)

The court by whom the issue joined in this case was tried having found by the verdict of the jury that the said defendants are guilty of unlawfully withholding from the plaintiff the premises described in his declaration in this cause as follows, to wit: (Insert description of premises) situated in the county of, and state of Illinois, heretofore commonly known as number street, and now commonly known as number street, in the city of, county of, and state of Illinois, and that the plaintiff is well entitled to hold the same in fee, and having assessed the damages of the plaintiff by reason thereof, over and above his costs and charges by him about his suit in this behalf expended at the sum of dollars; therefore, it is considered that the plaintiff do recover against the defendants the possession of the premises, according to the finding of the jury aforesaid, and that he have a writ of possession therefor, according to the force, form and effect of his said recovery; and, it is further considered, that the plaintiff do recover against the defendants his damages by the court, in form aforesaid, assessed, together with his costs and charges aforesaid, to be taxed; and that the plaintiff have execution therefor.

.....
.....Judge.

b

This day come the parties hereto, by their respective attorneys and thereupon said cause coming on to be heard upon the verdict of the jury rendered herein, and upon the motions for new trial in said cause made and entered by the defendants, and upon the argument of counsel for the respective parties, and due deliberation by the court, said motions for new trial are each and all overruled, and a new trial is denied; to which action of the court in overruling said motions and denying a new trial, the said defendants severally object and except.

Whereupon, said defendants make and enter their several motions in arrest of judgment herein; and upon argument of counsel for the respective parties, and due deliberation

⁹⁸ Daniels v. Smith, 252 Ill. 223.

eration by the court, said motions in arrest of judgment are each and all overruled and denied; to which action of the court in overruling and denying said motions in arrest of judgment, the said defendants also severally object and except.

Therefore, it is considered by the court that the plaintiff do have and recover of and from said defendants the possession in fee simple of that certain parcel of land with the appurtenances thereon belonging, situate and being in the city of, in the county of, and state of Illinois, known, designated and described as follows: (Insert legal description).

And that a writ of possession do issue therefor; and that he do have and recover of and from said defendants, his costs in this behalf expended,* and have execution therefor.

To which action of the court in entering judgment as aforesaid, said defendants also severally object and except, and jointly and severally pray an appeal from said judgment to the supreme court of Illinois, which is allowed upon the filing by said defendants as to their joint appeal, or any or either of them as to their several appeals, of a good and sufficient appeal bond herein, duly conditioned in the sum of dollars, with surety to be approved by the court within days from this date; and leave is hereby given said plaintiff and said defendants, or such of them as elect to do so, to present and file a bill of exceptions herein, within days from this date.

Enter

(Mississippi)

This cause coming on to be heard, and both parties appearing and issue being joined, and the cause being submitted to the court without a jury, and the court, after considering the evidence introduced and hearing argument of counsel, doth find for the defendant,, and doth order, the said defendants to have and retain the land here sued for, viz.: (Set forth legal description) and that the plaintiffs pay the costs herein expended, for which execution may issue.

To which action of the court in rendering judgment for the defendants and in not rendering judgment for the plaintiffs, the plaintiffs then and there instantly excepted and objected, and do still except and object.

WRIT OF POSSESSION AND RESTITUTION

1946 Jurisdiction

The court which renders a judgment in ejectment has a species of equitable jurisdiction over the writ of possession, and

may award the writ of restitution if justice requires it; but this writ is not demandable as a matter of right.⁹⁹

1947 Issuance of writ

A writ of possession (*habere facias possessionem*) at common law could not be issued a year and a day after the rendition of the judgment in ejectment.¹⁰⁰ In Illinois the writ of possession may issue at any time within seven years after the entry of the judgment.¹⁰¹

1948 Writs (Ill.)

State of Illinois, }
County of } ss.

The people of the state of Illinois, to the sheriff of said county, greeting:

Whereas,
.....
plaintiff, ha.. lately in the circuit court of county,
in and for the state of Illinois, by the judgment of the said court, recovered against
.....
one message, piece or parcel of land, situate in the county of
....., and state aforesaid, and known and described as follows, to wit:
which said premises have been, and are still, unjustly withheld from the said
..... by the said
..... whereof
convicted, as appears to us of record; and forasmuch as it is adjudged in the said court that the said
..... have execution upon
said judgment against the said
..... according to the force, form and effect of said recovery:

Therefore we command you, that, without delay, you deliver to the said
possession of the premises so recovered, with the appurtenances; and that you certify to the said court in what manner you shall have executed this writ, within ninety days from this date.

We also command you, that of the lands and tenements,

⁹⁹ *Bowar v. Chicago West Division Ry. Co.*, 136 Ill. 109; *Oetgen v. Ross*, 47 Ill. 142, 147 (1868).

¹⁰⁰ *Bowar v. Chicago West Division Ry. Co.*, 136 Ill. 105, 108.

¹⁰¹ *Bowar v. Chicago West Division Ry. Co.*, *supra*.

goods and chattels of the said
 defendant.,
 in your county, you cause to be made the sum of.....
 dollars and cents,
 which, by the said court, were adjudged to the said
 plaintiff.,
 for costs and charges by about
 suit in that behalf expended, whereof the said
 defendant convicted, as appears to us of record;
 and have you that money on the return day aforesaid ready to
 render to the said plaintiff for costs aforesaid,
 and have you then and there this writ.

Witness,, clerk of our said court, and the seal
 thereof, at, in said county and state, this
 day of, 19..

.....
 Clerk.

(Virginia)

The commonwealth of Virginia, to the sheriff of the county
 of, greeting:

We command that you cause the a corporation
 to have its possession of a certain tract or parcel of land lying
 and being in county,, and bounded
 as follows: (Describe premises) containing acres
 and being a part of the tract, upon which tract is
 house, which it lately in our circuit court of
 county, hath recovered against and
, with having entered in and upon the possession
 of the said and therefrom to eject it; whereof the
 said are convict as appears to us of record.

And how you shall have executed this writ make known at
 the next term of our said court.

And have then and there this writ.

Witness, etc.

Return

Executed this day of, by ejecting
 the said household effects from the within men-
 tioned premises and nailing up the windows of the house and
 locking the doors and delivering possession to the plaintiff.

..... D. S.
 for Sheriff.

1949 Appeal

An appeal from an order denying the quashal of a writ of possession lies directly to the supreme court, if the relief sought involves the right of the plaintiff in ejectment to his freehold.¹⁰²

NEW TRIAL

1950 Motion (Ill.)

Now comes the said defendant and moves the court for a new trial in said cause in accordance with the provisions of the statute in such case made and provided for a statutory new trial herein, and brings into court the receipt of the clerk thereof showing that all costs have been paid herein by said defendants.

.....
Defendant's attorney.

1951 Order (Ill.)

This day come the said parties herein, said plaintiffs and said defendants by their respective counsel, and this cause now coming on to be heard upon a motion of the said defendants to set aside the finding of the court and vacate the judgment entered herein, the court listened to the argument of counsel and having fully considered the same and being now sufficiently advised in the premises and being fully satisfied that all costs accruing in this cause to this date have been fully paid by said defendants, the court under the statute in such case made and provided, doth allow said motion, and accordingly doth set aside said finding of the court and doth vacate said judgment so entered.

1952 Appeal

An order granting a second trial in ejectment is not reviewable on appeal or error, because the order is not final.¹⁰³

MESNE PROFIS AND IMPROVEMENTS

CLAIM

1953 Nature of suggestion

The common law action of trespass for *mesne* profits has been changed to an action of assumpsit in Illinois.¹⁰⁴

¹⁰² Bowar v. Chicago West Division Ry. Co., 136 Ill. 111.

¹⁰³ Williams v. La Valle, 64 Ill. 110, 111 (1872).

¹⁰⁴ Ringhouse v. Keener, 63 Ill. 234; Sec. 44, Ejectment act.

1954 Notice (Ill.)

State of Illinois, {
..... county, } ss.

In the circuit court of county, to the term, 19..

..... } Ejectment.
v. } Suggestion of Mesne Profits.
..... }

To, defendant in the above entitled cause:

Take notice that on this day, to wit, the day of, 19.., a suggestion for *mesne* profits, a true copy of which is hereto attached has been filed in the office of the clerk of the said circuit court in the above entitled cause, and that the same will stand for trial at the above mentioned term of court to be begun and holden at, in the said county and state on the of, 19..

You are hereby notified that unless you appear in the said court on the said of, 19.., and plead, answer or demurrer, or otherwise make defense thereto, a default will be entered therein against you and the damages thereon will be assessed according to law.

Dated, etc.

.....
Plaintiff.

By
..h.. attorney.

1955 Declaration (Ill.)

¹⁰⁵ And now comes the said plaintiff, by, her attorney, and files this her suggestion for *mesne* profits in the above entitled cause against the said defendant.

For that whereas, heretofore, to wit, on the day of, 19.., the said plaintiff was and still is the owner in fee of the (Insert description) in the said county and state, being the same premises recovered by the said defendant in the above entitled cause, and that on the date last aforesaid the said defendant entered upon and took exclusive possession of the said premises, and so continued to possess, occupy, use, farm and cultivate the same during and until, to wit, the day of, 19.., whereby the said defendant became and was liable to pay therefor to the said plaintiff such sum of money as the said possession, use, and occupation were reasonably worth, and the said plaintiff avers that the said possession, use and occupation during the

¹⁰⁵ Caption as in original action of ejectment.

said period of time were reasonably worth the sum of dollars.

And being so indebted he, the said defendant, in consideration thereof afterwards, to wit, on the day last aforesaid, at the county aforesaid, undertook and then and there faithfully promised the said plaintiff to pay her the said sum of dollars when he, the said defendant, should be thereunto afterwards requested.

2. And whereas, also, afterwards, to wit, on the day of, 19.., in the county of, aforesaid, the said defendant was indebted to the said plaintiff in the sum of dollars for the use and occupation by the said defendant of a certain other farm with the appurtenances, of the said plaintiff, to wit: (Insert description) in the said county and state, being the same premises recovered by the said plaintiff of the said defendant in the above entitled cause, which said premises for a long time before then elapsed, to wit, for the space of years, the said defendant had held, used, occupied, possessed and enjoyed by the sufferance and permission of the said plaintiff.

And being so indebted he, the said defendant, in consideration thereof afterwards, to wit, on the day last aforesaid at the county aforesaid undertook and then and there faithfully promised the said plaintiff to pay her the said sum of dollars when he, the said defendant, should be thereunto afterwards requested.

3. And whereas, also, afterwards, to wit, on the day of, 19.., at the county and state aforesaid, in consideration that the said plaintiff had before that time suffered and permitted the said defendant to have, hold, use and occupy, possess and enjoy a certain other farm with the appurtenances of the said plaintiff, to wit, (Insert description) in the said county and state, being the same premises recovered by the said plaintiff of the said defendant in the above entitled cause, and that he, the said defendant, according to the said last mentioned sufferance and permission of the said plaintiff had held, used, occupied, possessed and enjoyed the said premises for a long time before then elapsed, to wit, for the space of years, he, the said defendant, undertook and then and there faithfully promised the said plaintiff to pay her so much money therefor as the said possession, use and occupation were reasonably worth; and the said plaintiff avers that the said possession, use and occupation during the said period of time were reasonably worth the sum of dollars lawful money at the county aforesaid; whereof the said defendant afterwards, to wit, on the day and year last aforesaid had notice.

4. And whereas, also, afterwards, to wit, on the day of, 19.., at the county and state aforesaid, in consideration that the said plaintiff had before that time suffered and permitted the said defendant to have, hold, use and occupy, possess and enjoy a certain other farm with the appurtenances of the said plaintiff, to wit, (Insert description) in the said county and state, being the same premises recovered by the said plaintiff of the said defendant in the above entitled cause, and that he, the said defendant, according to the said last mentioned sufferance and permission of the said plaintiff had held, used, occupied, possessed and enjoyed the said premises for a long time before then elapsed, to wit, for the space of years, he the said defendant, undertook, and then and there faithfully promised the said plaintiff to pay her so much as she therefor reasonably deserved to have of the said defendant, when he, the said defendant, should be thereunto afterwards requested; and the said plaintiff avers that she reasonably deserves to have of the said defendant the sum of dollars lawful money at the county of aforesaid; whereof the said defendant afterwards, to wit, on the day and year last aforesaid had notice.

5. And whereas, also, afterwards, to wit, on the day of, 19.., in the county of aforesaid was indebted to the said plaintiff in the sum of dollars lawful money for the rents and profits of a certain other farm and its appurtenances of the said plaintiff, to wit, (Insert description) in the said county and state, being the same premises recovered by the said plaintiff of the said defendant in the above entitled cause, which said rents and profits of the said premises for a long time before then elapsed, to wit, for the space of years, the said defendant had taken, collected, received, used, and enjoyed by the sufferance and permission of the said plaintiff; and being so indebted he, the said defendant, in consideration thereof afterwards, to wit, on the date last aforesaid undertook and then and there faithfully promised the said plaintiff to pay her the said sum of money when he the said defendant should be thereunto afterwards requested, to wit, at the county of aforesaid.

6. And whereas, also, to wit, on the day of, 19.., the said plaintiff was and still is the owner in fee of the (Insert description) in the said county and state, being the same premises recovered by the said plaintiff of the said defendant in the above entitled cause, and that on the day last aforesaid, the said defendant entered upon and took exclusive possession of the said premises and so continued to possess, use, and occupy the same during and unto, to wit, the day of, 19..; and the said plaintiff avers that within and

during the said time of the said possession, use, and occupation the said defendant took and received, used and consumed from and off the said premises a large quantity of wood, timber, rails, lumber, and posts for which the said defendant became and was indebted to the said plaintiff in such sum of money as the said wood, timber, rails, lumber and posts were reasonably worth; and the said plaintiff avers that the said wood, rails, lumber and posts were reasonably worth the sum of dollars; and being so indebted the said defendant afterwards, to wit, on the said last mentioned date in consideration thereof at the county aforesaid undertook and then and there faithfully promised the said plaintiff to pay her the said sum of money when he the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant not regarding his said several promises, undertakings, liabilities and obligations, but contriving and fraudulently intending to deceive and defraud the said plaintiff in that behalf hath not as yet paid the said several sums of money or any or either of them or any part thereof to the said plaintiff although often requested so to do, but the said defendant to pay her the same hath hitherto wholly neglected and refused and still doth neglect and refuse, to the damage of the said plaintiff of dollars; and therefore, she now here files this her suggestion for *mesne* profits in the said cause according to the statute in such case made and provided.

1956 Copy of account sued on (Ill.)

| | |
|---|-----|
| | |
| To | Dr. |
| To the possession, use and occupation of the (Insert description) for | \$ |
| years, ending, 19..... | |
| To wood, timber, rails, lumber and posts taken and used from and off the said de- scribed lands, within and during the years, ending, 19.., | |
| To rents and profits taken and received from and off the said described real estate for years, ending.. 19.., | |

1957 Return (Ill.)

(Venue)

I hereby certify that I have this day served the within notice and suggestion by reading and delivering a true copy of same to the within named

..... Sheriff.

By Deputy.

1958 Summons (Ill.)

The people of the state of Illinois, to the sheriff of said county, greeting:

We command you to summon if he shall be found in your county, personally to be and appear before the circuit court of said county on the day of the next term thereof, to be holden at the court house in, in said county, on the day of, 19.., to answer unto, in an action of ejectment to recover the *mesne* profits on suggestion filed therein of the following described premises, viz.: (Insert description). Which said premises the said recovered in fee of and from the said in an action of ejectment at term, 19.., of the said county circuit court, and to the damage of said plaintiff as she says in the sum of dollars; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness (clerk), etc.

DEFENSES

1959 General issue (Ill.)

And the said defendant by, his attorney, comes and defends the wrong and injury, etc., when, etc., and says that he did not undertake and promise in manner and form as the said plaintiff has in her said declaration for *mesne* profits thereof complained against him; and of this he puts himself upon the country, etc.

1960 Improvements, allowance

A defendant in ejectment is allowed for improvements under the Occupying Claimant's law only where he is evicted from the land upon which he had entered peaceably, having a clear, connected title in law or equity deduced from the record of some public office and had made the improvements before receiving actual notice of the title of his adversary.¹⁰⁶ Improvements are available as a set off against a claim for *mesne* profits only to the amount of that claim.¹⁰⁷

1961 Improvements, set-off; plea (Ill.)

And for a further plea in this behalf defendant says *actio non*, because he says that the said several causes of action in the

¹⁰⁶ Wakefield v. Van Tassell, 218 Ill. 572, 575 (1905).

¹⁰⁷ Wakefield v. Van Tassell, *supra*.

several counts of plaintiff's declaration mentioned are for one and the same cause of action, to wit, the rents and profits, use and occupation of the (Insert description) in said county, and for no other cause of action whatever; and defendant avers that while and during the time said premises were used and occupied by the defendant, said defendant made large and valuable improvements on said premises of the value of, to wit, dollars; and defendant avers that before and at the time of the commencement of this action said plaintiff was indebted to said defendant in the sum of dollars for improvements made by this defendant on said premises and that the same is now due from said plaintiff to the defendant, which said sum of money so due to this defendant exceeds the damages sustained by the plaintiff by reason of the non performance by said defendant of the said several promises in said declaration mentioned, and out of which said sum of money so due to this defendant the said defendant is ready and willing and hereby offers to set off and allow to the plaintiff the full amount of the said damages according to the form of the statute in such case made and provided; and this the defendant is ready to verify, etc., whereupon he prays judgment, etc.

Replication

That she was not nor is indebted to the said defendant in manner and form as the said defendant hath in his said plea alleged (Conclude to the country).

b

That the said causes of set off and defense in the said plea mentioned accrued to the said defendant prior to the day of, 19.., and that prior to that date the said defendant had used, occupied, possessed and enjoyed and had taken and received from and off the said premises mentioned in the said plea for a long space of time before that, to wit, for the space of years, a large amount of rents and profits, wood, timber, and rails, to wit, of the value of dollars; and the plaintiff avers that the said use, occupation, possession and enjoyment, and the said rents and profits, and wood, timber and rails were more than sufficient to pay the said defendant for the said causes of set off and defense in the said plea mentioned, and that the said causes of set off and defense in the said plea mentioned were paid and satisfied and canceled by the said use, occupation, possession and enjoyment and the said rents and profits and the wood, timber and rails so taken and received before the said day of, 19.., as aforesaid; (Conclude to the country).

1962 Statute of limitations, plea (Ill.)

And for a further plea in this behalf as to all causes of action in the said several counts of said plaintiff's declaration mentioned accruing to said plaintiff prior to the day of, 19.., the said defendant says that the said plaintiff ought not to have or maintain the same thereof against him because he says that the said causes of action and each and every one of them did not at any time within five years next before the commencement of this suit accrue to the plaintiff; and this the defendant is ready to verify. Whereupon he prays judgment if the plaintiff, his action aforesaid on the causes of action accruing before the said day of, 19.., aforesaid thereof against him ought to have or maintain, etc.

.....
Attorney for defendant.

VERDICT**1963 Plaintiff**

We, the jury, find the issues joined in favor of the plaintiff and assess her damages at the sum of dollars and cents.

JUDGMENT**1964 Plaintiff (Ill.)**

¹⁰⁸ It is therefore ordered by the court that the plaintiff have and recover of and from the defendant, the sum of dollars and cents, the amount assessed by the jury, together with her costs herein expended, and that she have execution therefor.

¹⁰⁸ Precede by recital of appearances as in any other judgment.

CHAPTER XXVIII

REPLEVIN

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| | |
|---|--------------------------------------|
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IN GENERAL

1965 Action, possession and identity

Replevin is not maintainable unless the party who seeks the remedy has a right of possession to the property to be replevied,¹ and no recovery can be had of property which the sheriff cannot identify and deliver to the plaintiff.²

1966 Property, seizure, effect

Neither the writ nor an order of court can compel the defendant to deliver the property sought to be recovered in an action of replevin. It is the duty of the officer, however, to find the property sought and to seize it. If he fails to do this, he must read the writ to the defendant and make return, and the case proceeds as in an action of trover for the recovery of the value of the property.³ The ownership of property seized under a replevin writ is in no way changed, unless followed by judgment.⁴

1967 Virginia

In Virginia, the action of replevin was partially abolished in 1823 and entirely abrogated in 1849.⁵

¹ Richbourg v. Rose, 53 Fla. 173 (1907).

² German National Bank v. Meadowcroft, 95 Ill. 124, 129 (1880).

³ Yott v. People, 91 Ill. 11, 13 (1878).

⁴ Bruner v. Dyball, 42 Ill. 34, 37 (1866).

⁵ Sec. 9, c. 29, Laws 1819-1823, p. 31; Sec. 4, c. 148, Code 1849, p. 589.

DEMAND

1968 Generally

The making of a demand before bringing an action of replevin is not necessary where the taking is unlawful and wrongful;⁶ but when the action is to be in *detinet* alone, the making of a previous demand and a refusal is essential to the bringing of the action.⁷

1969 Assigned property

An assignee of property which has been taken on execution against the assignor may bring replevin without making demand upon the officer for the return of the property before instituting the suit.⁸

1970 Exempted property

Before bringing replevin for exempted property, the making of a selection and a specific demand for the property as exempt are necessary.⁹

1971 Property of third person

An action of replevin or trover is maintainable against an officer, without making a previous demand upon him, to recover the property of a third person to the execution taken by the officer after he has been distinctly advised that the property belonged to such person; but a demand is requisite to the maintenance of the action when the goods of such person were so intermingled and confused with the goods belonging to the execution debtor as that they could not be distinguished.¹⁰

1972 Time to demand

A demand must precede the bringing of the suit to put a party to the election to give up the property or to take the risk of litigation on the right of property alone; the demand cannot be made after the bringing of the suit and have it relate back.¹¹

⁶ *Trudo v. Anderson*, 10 Mich. 357, 370 (1862).

⁷ *Ingalls v. Bulkley*, 13 Ill. 315, 317 (1851); *Campbell v. Quackenbush*, 33 Mich. 287, 288 (1876).

⁸ *Pogue v. Rowe*, 236 Ill. 157, 159 (1908).

⁹ *Lindley v. Miller*, 67 Ill. 244, 249 (1873).

¹⁰ *Greenberg v. Stevens*, 212 Ill. 606, 609 (1904).

¹¹ *Keller v. Robinson & Co.*, 153 Ill. 458, 467 (1894).

AFFIDAVIT

1973 Requisites

An affidavit in replevin is sufficient if it is substantially in the language of the statute.¹²

1974 District of Columbia

¹³ District of Columbia, ss.

....., being first duly sworn, on oath deposes and says that he is the agent of; that the defendant in this suit is; that according to affiant's information and belief, the plaintiff is entitled to recover possession of the chattels proposed to be replevied, being the same that are described in the declaration hereto attached; that the defendant detains the same; and that the said chattels were not, nor are they now, subject to such detention, and were not taken upon any writ of replevin between the parties.

Subscribed, etc.

1975 Florida

(Venue)

Before me,, in and for said county, personally appeared, who, being duly sworn, says that he is, the plaintiff in the above stated case, and that is lawfully entitled to the possession of the following property, to wit: (Describe property specifically). That said property is detained by, defendant, in this county, who ha.. the same in possession; that said property has not been taken for any tax, fine or assessment levied by virtue of any law of this state pursuant to statute, nor seized by virtue of an execution or attachment against the property of said liable to execution; that the actual value of said property is dollars.

Sworn, etc.

1976 Illinois, owner of goods

(Venue)

....., of the city of, county of and state of, being duly sworn, on oath deposes and says that he is the owner, and is now law-

¹² Burton v. Curyea, 40 Ill. 320, 334 (1866).

¹³ See Section 211, Note 60.

fully entitled to the possession of the following goods and chattels, to wit: All the (Describe property) situated in the, in the city of, county of and state of Illinois, of the value of dollars; that the said property is wrongfully detained by one, sheriff of county; and that the same has not been taken for any tax, assessment or fine, levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of him, the said, liable to execution or attachment, nor held by virtue of any writ of replevin against him, the said

Subscribed, etc.

1977 Illinois, corporation as agent

(Venue)

....., a corporation organized under the laws of by, a corporation organized under the laws of Illinois, its agents being duly sworn, doth depose and say that, a corporation as aforesaid, is now lawfully entitled to the possession of the following goods and chattels about to be replevined, to wit: (Describe goods); that said goods and chattels are of the value of dollars; that, sheriff of county, Illinois, wrongfully took, and now wrongfully detains the said goods and chattels from the said, as aforesaid; and that said goods and chattels have not been taken for any tax, assessment or fine levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of the said, as aforesaid liable to execution or attachment, nor held by virtue of any writ of replevin against it.

R company.

By P company,

By S, its secretary and treasurer of P company.

Subscribed, etc.

1978 Illinois, amended affidavit

....., by leave of court first had and obtained, doth file this, his amended affidavit in the case of against, now pending in the court of said county, and being duly sworn, doth depose and say that he is the agent in this behalf of, a (firm, etc., or corporation, etc.); that said are the owners of, and at the time of the institution of this suit were, and are now, lawfully entitled to the possession of the following goods and chattels, viz.:

which are the same goods and chattels that are named in the original affidavit herein filed; and that said goods and chattels are of the value of dollars.

That on the day of, 19.., one wrongfully took and wrongfully detains the said goods and chattels from this affiant; and that said goods and chattels have not been taken for any tax, assessment or fine levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of this affiant liable to execution or attachment, nor held by virtue of any writ of replevin against said plaintiffs.

Subscribed, etc.

1979 Michigan

(Venue)

..... and, of the of, in the county of and state of, being duly and severally sworn, depose and say that they,, and, these affiants, are now lawfully entitled to the possession of the following goods and chattels: (Describe the property); being the same property described in the annexed writ of replevin;¹⁴ that the same has not been taken for any taxes, assessments or fine levied by virtue of any law of this state, nor seized under any execution or attachment against the goods and chattels of these affiants, or either of them, liable to execution; and that the above mentioned goods and chattels are unlawfully detained by of said county, the defendant in said writ.

Subscribed, etc.

1980 Mississippi

(Venue)

Before me, a duly authorized officer in and for the county of, state of, personally appeared of the plaintiff in this suit and made affidavit that (Give detailed description of property and value of each item) is the property of the affiant and is wrongfully detained by in said..... district, county and state, and that this affiant is entitled to imme-

¹⁴ The Michigan statute does not require the statement of the value of the goods in replevin affidavits in actions other than those brought be-

fore justices of the peace. The affidavit must be annexed to the writ prior to its execution (748), (10,654), C. L. 1897.

diate possession thereof; wherefore, he prays a writ of replevin for the seizure of said property.

Sworn, etc.

BOND

1981 District of Columbia

Whereas, the plaintiff about to sue out a writ of replevin against the defendant., in this action; therefore, the said plaintiff., and suret....., appear, and, submitting to the jurisdiction of the supreme court of the District of Columbia, hereby undertake for themselves, and each of them, their and each of their heirs, executors, and administrators, successors, or assigns, to abide by and perform the judgment of said court in the premises, which judgment may be rendered against all the parties whose names are hereto subscribed.

Signed this day of, 19..

(Signatures and seals)

Approved, 19..

Clerk.

By Assistant Clerk.

Surety's oath

District of Columbia, ss.

....., suret in the above undertaking swears that he is the owner of real estate situate in said District of the value of (\$.....) dollars, over and above all debts and prior obligations, and that he resides at No. in

Subscribed and sworn to before me, 19..

Clerk.

By Assistant Clerk.

1982 Florida, general

Know all men by these presents, that we and and are held and firmly bound unto in the sum ofdollars, for the payment whereof well and truly to be made we bind

ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed and sealed this day of 19...

The condition of the above obligation is such, that whereas the said ha.. this day begun an action of replevin to recover possession of personal property, to wit: (Describe the property) of the actual value of dollars.

Now, therefore, if the said, shall diligently prosecute the said action and return the said property to the said, if return thereof shall be adjudged, and shall pay him all such sums of money as may for any cause be recovered against said plaintiff by said defendant in said action for any cause whatever, then this obligation shall be void; else to remain in full force and virtue.

Executed in the presence of

(Signatures and seals)

1983 Florida, distress for rent

¹⁵The condition of the above obligation is such that whereas the sheriff of county has, by virtue of a distress warrant issued from the circuit court judicial circuit of Florida for county at the suit of said and as executors of the last will and testament of deceased levied on (Describe property) the property of said upon a demand for rent claimed to be due by the said to the said, as executors aforesaid, and the said has made oath by affidavit that the said rent is not due and desires to replevy the property so levied on by said sheriff by virtue of said distress warrant.

Now, therefore, if the said shall well and truly pay the amount or value of the rent, which upon trial may be found to be due from the said to the said and as executors, then this obligation to be void; else to remain in full force and virtue.

(Signatures and seals)

1984 Illinois, sheriff

Know all men by these presents, that we as principals and as surety are held and firmly bound unto, sheriff of the county of, in the state of Illinois, and to his successors in office, executors, administrators, and assigns, in the penal

¹⁵ Obligation as in Section 1982.

sum of dollars, lawful money of the United States, for the payment of which sum we do hereby, jointly and severally, bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such, that whereas, on the day of, 19.., the said sued out of the court of county aforesaid, a writ of replevin against, trading as, defendant, for the recovery of the following goods and chattels, property, to wit: (Insert specific list of property).

Now, if the said plaintiff, shall prosecute its suit to effect, and without delay, and make return of said property, if return hereof shall be awarded, and save and keep harmless the said sheriff in replevying the said property, and pay all costs and damages occasioned by wrongfully suing out said writ of replevin, then this obligation to be void; otherwise to remain in full force and effect.

Witness, etc.

1985 Illinois, sheriff, additional bond

¹⁶ The condition of this obligation is such, that whereas, on the day of, 19.., the said sued out of the court of county aforesaid, a writ of replevin against, defendant., for the recovery of the following described goods and chattels, property, to wit:

And whereas the plaintiff.. in said suit did on said date file, their bond in the penal sum of dollars, with as surety;

And whereas, on the day of, 19.., was by leave of court, made party defendant to the said suit, and the plaintiff in said suit w.... thereupon ordered to file an amended bond.

Now, etc., (Continue as in original bond).

1986 Illinois, coroner

¹⁷ The condition of this obligation is such, that, whereas, on the day of 19.., the said sued out of the court of county aforesaid, a writ of replevin against, defendant, for the recovery of the following described goods and chattels to wit: (Describe property); and all the property contained in the premises on floor of the building situated on the corner streets, being the same property levied on by the sheriff of county, by virtue of an execution on the day of 19..

¹⁶ Precede by obligation as in Section 1984.

¹⁷ Precede by obligation as in Section 1984, substituting the word "coroner" in place of "sheriff."

Now, if the said, plaintiff, shall prosecute his suit to effect, and without delay, and make return of said property, if return thereof shall be awarded, and save and keep harmless the said coroner in replevying the said property, and pay all costs and damages occasioned by wrongfully suing out said writ of replevin, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals, this day of 19...

1987 Michigan

Know all men by these presents, that we,
 as principal.,
 and
 as sureties, are held
 and firmly bound unto,
 sheriff of the county of
 and his assigns, in
 the sum of dollars,
 lawful money of the United States of America, to be paid to
 the said, sheriff of the
 county of
 or to his assigns, to which payment well and truly to be made,
 we bind ourselves, our and each of our heirs, executors and ad-
 ministrators, jointly and severally, firmly by these presents.

Sealed with our seals, dated the day of
 19...

The condition of this obligation is such, that if the above
 bounden

 shall prosecute to effect a certain suit in replevin which
 ha.. commenced in the circuit court for the county of
 against
 defendant.. for taking and unjustly detaining

 and if the said defendant.. shall recover judgment against
 in the said action, then if the said.
, plaintiff.. shall return
 the said property, if return thereof be adjudged, and shall pay
 to the defendant.. all such sums of money as may be recovered
 by such defendant.. against in the said ac-
 tion, then the above obligation to be void; otherwise to remain
 in full force and virtue.

(Signatures and seals)

Surety's oath

State of Michigan, }
 County of } ss.

.....
 of the of in said county of
 sureties of the principal.. named in the within and foregoing
 bond, being duly sworn, each for himself deposes and says, that
 he is worth in unincumbered property, not exempt from exe-
 cution under the laws of this state, the sum of
 dollars, after payment of all just debts, claims, and liabilities.

Subscribed and sworn to before me, this day of
, 19..

.....

I hereby approve of the within bond and of
 and as the sureties therein
 this, etc.

.....

Sheriff.

WRIT

1988 District of Columbia

The President of the United States to the marshal for said Dis-
 trict, greeting:

The plaintiff.. in this action having entered into an under-
 taking, with surety as required by law, you are therefore hereby
 commanded to take the goods and chattels claimed by the plain-
 tiff.., to wit:
 from the defendant and deliver the same to the plaintiff..
 And warn the defendant.. to appear in said court on or
 before the twentieth day, exclusive of Sundays and legal holi-
 days, occurring after the day of the service of this writ, and
 answer said action: and that if ..he.. make default in so
 doing the plaintiff may proceed to judgment and execution.

Witness, the honorable, chief justice of
 said court, the day of, 19....

.....

Clerk.

By

Assistant Clerk.

1989 Florida

The state of Florida, to all and singular the sheriffs of said state:

You are hereby commanded to replevy the goods and chattels, to wit: (Describe same) in the possession of and you are hereby further commanded to summon the said, defendant., if to be found in your county, to be and appear before the judge of our circuit court for the judicial circuit of Florida, at the court house in on Monday, the day of 19.., to answer the plaintiff in the premises.

Witness,, clerk circuit court, county, Florida, and the seal of our said court, at the court house in the city of afore-said, this the day of, 19...

Clerk Circuit Court county.

By Deputy Clerk.

..... Plaintiff's attorney.

1990 Illinois, sheriff

State of Illinois, }
County of..... }ss.

The people of the state of Illinois, to the sheriff of county, greeting:

Whereas, plaintiff complain that

defendant.. unlawfully and wrongfully ha.. taken and do.. detain the following described goods and chattels, to wit: (Describe same) of the value of dollars.

Therefore, we command you, that if the said plaintiff.. shall give you bond with good and sufficient security, in double the value of said goods and chattels, as required by law, to prosecute suit in this behalf to effect and without delay, and to make return of the said goods and chattels, if return thereof shall be awarded, and to save and keep you harmless in replevying said goods and chattels, you cause the said goods and chattels to be replevied and delivered to said plaintiff without delay; and also that you summon the said defendant to be and appear before the circuit court of county, on the first day of the next term thereof, to be holden at the court house in the city of, in said county, on

the Monday of 19.., to answer said plaintiff.. in the premises.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same, together with the bond which you shall have taken from the said plaintiff.. as before commanded, before executing this writ.

Witness,, clerk of the said court and the seal thereof, at, in said county, this day of, 19..

.....
Clerk.

Return

The plaintiff having given security as per bond hereto annexed, I have this day of replevied that part of the within described property above described and have delivered the same to the company as per its receipt hereon endorsed this day of 19.. Also served this writ by reading the same to the within named defendant this day of, 19..

.....
Sheriff.

By
Deputy.

1991 Illinois, coroner

State of Illinois, }
County of..... } ss.

The people of the state of Illinois, to the coroner of said county, greeting:

Whereas,, a corporation organized under the laws of the state of by a corporation organized under the laws of the state of Illinois, its agent.. by, secretary and treasurer of said, plaintiff, complains on oath before, clerk of court of, said county, that, sheriff of the county of, defendant wrongfully took and wrongfully detains the following goods and chattels, of which it, the said by its agent is now lawfully entitled to the possession, to wit: (Describe goods) of the value of dollars. Now, therefore, we command you, that if the said by, its agent, shall give you good and sufficient security, in double the value of said goods and chattels, as required by law, to prosecute its suit to effect and without delay, and to make return of the said goods and chattels, if return thereof be awarded, and further to save and keep you harmless in replevying said property, then you are to cause the said goods and chattels to be replevied and delivered to said plaintiff without delay. And also that you summon the defendant personally to be and ap-

pear before our court in and for said county, on the first day of the next term thereof, to be holden at the court house in said county, on the day, 19.., to answer said plaintiff in the action; or in case the above mentioned property, or any part thereof, is not found and delivered to the said coroner, to answer the said plaintiff for the value of the property not found and delivered as aforesaid to the damage of said plaintiff of dollars.

And make due return of the bond to be taken of the said plaintiff aforesaid together with this writ, to the clerk of our said court, with an endorsement hereon as to your doings in the premises.

Witness, (clerk, etc.).

Return

State of Illinois, }
.....county. } ss.

I have served this writ of replevin by reading the same to the within named, sheriff of, Illinois, the defendant in this case, at minutes before M., on the of, 19..; and also read the same to him again at minutes before M., on said day of, 19..; and I took the property herein described to wit: (Describe goods) from the possession of said defendant and delivered the possession thereof to, the attorney for the plaintiff in this cause, as I am herein commanded.

.....
Coroner.

1992 Michigan

State of Michigan,

The circuit court for the county of, in the name of the people of the state of Michigan to:

You are hereby notified, that a suit has been commenced against you in the circuit court for the county of, by as plaintiff...; and that if you desire to defend the same you are required to have your appearance filed or entered in the cause, in accordance with the rules and practice of the court, in person or by attorney, within fifteen days after service of this writ upon you. Hereof fail not, under penalty of having judgment taken against you by default. The plaintiff.. claim.. damages in said suit not exceeding dollars. Service of this writ shall be made on or before the of, 1...., which is the return day hereof.

To the sheriff of said county:

We command you that you do forthwith, and on or before the return day above mentioned, take into your custody the following goods and chattels, to wit: (Describe same) and deliver the same to said plaintiff.., if ..he.. shall give you security as required by law to prosecute to effect this writ against said defendant.., and to return the aforesaid goods and chattels, if return thereof shall be adjudged, and to pay all such sums of money as may be recovered against ..h.... hereupon; and also that you summon the said defendant.. to appear before said court, as above set forth, to answer to said plaintiff.. concerning the unlawful detention of said goods and chattels.

Witness, honorable, circuit judge, and the seal of said court, at the of the place of holding said court, this day of, 19..

....., Clerk.

.....,
Attorney.. for plaintiff..
Business address

Return

State of Michigan,) ss.
County of.....)

I do hereby certify and return, that by virtue of the within writ, I did, on the day of, 19.., as within I am commanded, replevy the following goods and chattels, to wit: (Describe same) which were appraised by and, disinterested persons, who were by me first duly sworn for that purpose, and whose appraisal is in writing, signed by themselves, and herewith returned; and I do further return, that afterwards, on the day of, 19.., I delivered the goods and chattels so replevined, to the within namedhe.., the said having first executed and delivered to me the requisite bond under the statute, with and, of the of, in said county as sureties; and I do further return, that I did, on the day of, 19.., according to the command of said writ, summon..... in said writ named, by delivering a certified copy of said writ to, personally My fees,

Dated,, 19..

.....
Sheriff.

1993 Mississippi

The state of Mississippi,

To the sheriff of county, greeting:

You are hereby commanded to take the following described property, to wit: (Set forth detailed description of the property and the value as in the affidavit) alleged by, the plaintiff, to be wrongfully detained by, the defendant, and to deal therewith according to law, unless the defendant.. herein enter into bond with surety, within two days after seizure conditioned to have said property forthcoming to abide the final determination of this suit, in accordance with the statute.

You are further commanded to summon the said to be and personally appear before the circuit court of district of county, on the Monday of, 19.., to answer the said for the alleged wrongful detaining of said property. And have then and there this writ.

Given under my hand, and seal of said court, this the day of, 19..

..... Clerk.
..... D. C.

Return

Executed the within writ by taking possession of the following described and separately valued property (Set forth items and separate value of each) found in the possession of and by summoning the defendant,, according to the command of said writ, and I have delivered to a true copy of the within writ.

..... Sheriff.
By Deputy Sheriff.

b

I have this day executed the within writ personally by seizing and taking into my possession the within named (Describe property); and whereupon bond being entered into by, as principal, and, as sureties on said bond, I have further executed said writ by placing the said (Describe property) in the possession of, as directed in said bond; and I have further executed said writ this day by delivering to the within named defendant,, a true copy of this writ this day of, 19..

SPECIAL CAUSES AND DECLARATIONS

1994 Attachment

The owner of goods held wrongfully under an attachment writ may replevy the goods from the officer at any time while they remain in his possession, even after the rendition of judgment in attachment and the levy of a special execution thereon.¹⁸

1995 Bailment

The general owner of property may maintain replevin against the bailee who holds the property for a special purpose and who is about to lose it by its unauthorized transfer.¹⁹

1996 Conditional sale

Goods received conditionally may be replevined after the non-performance of the condition.²⁰

1997 Manufactured articles

Replevin is not maintainable for the recovery of articles which are to be manufactured under a general contract, when some further act to complete the sale is necessary on the part of the manufacturer or seller.²¹

1998 Minor's property, Narr. (Miss.)

For that heretofore, on or about the day of, 19.., and since that day the said defendant wrongfully detained and now wrongfully detains the possession of (Describe property) of the value of dollars, said (Describe property) being the property of the said minor,, and he, the said plaintiff, avers and charges that he is years of age, that the title of said (Describe property) is absolute in him; plaintiff further avers that, father of said, and next friend, by whom he is suing, traded the aforesaid (Describe property) to one, on the date first above mentioned, to wit, on or about the day of, 19.., and that the said traded said (Describe property) to said, defendant herein,, who now detains the possession of the same, in the town of, Mississippi.

¹⁸ Juilliard & Co. v. May, 130 Ill. 87, 94, (1889); Samuel v. Agnew, 80 Ill. 553 (1875).

¹⁹ Burton v. Curyea, *supra*.

²⁰ Robinson v. Yetter, 238 Ill. 320, 327 (1909).

²¹ Updike v. Henry, 14 Ill. 378 (1853).

1999 Mortgaged property

An action of replevin is not maintainable against a mortgagee after condition broken, although the property mortgaged was once taken under the mortgage but subsequently re-delivered to the mortgagor.²²

2000 Turpentine

Turpentine in boxes is personal property as a species of *fructus industriales*, and is subject to replevin.²³

2001 Voluntary assignment

An assignee under a common law assignment may maintain replevin against a constable having possession of the assigned property.²⁴

GENERAL DECLARATIONS

2002 District of Columbia

The plaintiff,, sues the defendant,, for unjustly detaining his, said plaintiff's, goods and chattels, to wit, the same being (Give specific description).

That the said goods are of the value of dollars, and the plaintiff claims that the same may be taken from defendant and delivered to him, or if they are eloiigned, that he may have judgment for their value, and have *mesne* profits and damages which he estimates at dollars besides costs.

.....
Attorney for plaintiff.

2003 Florida

For that defendant heretofore, and before the commencement of this suit on the day of, 19.., wrongfully took possession and wrongfully and unlawfully detained (Describe goods or other property) of the value of dollars, the property of the plaintiff, and refused to surrender possession of said (goods or other property) to the plaintiff on his demand therefor, although the plaintiff was then and now is the owner of the said (goods or other property) and is lawfully entitled to the possession of the same, and although said (goods and other property) has not been taken for any tax, assessment, or fine levied by virtue of any law of the state of Florida, nor seized under any execution or attachment

²² *Lange v. Cole*, 239 Ill. 88 (1909).

²⁴ *Pogue v. Rowe*, *supra*.

²³ *Richbourg v. Rose*, *supra*.

against the property, goods, and chattels liable to execution; and the plaintiff claims the return of the said (goods or other property) or its value, and dollars damages for its detention.

2004 Illinois, taking ²⁵

For that the defendant.., on the day of, 19.., in the city of, county and state aforesaid, wrongfully took the goods and chattels of the plaintiff.., to wit: (Describe property) situated in the at of and, in said city, of the value of dollars and unjustly detained the same until the day of, 19..

And that although often requested, said defendant.. ha.. refused, and still refuse.., to deliver the said goods and chattels above mentioned to the said plaintiff..

Wherefore, etc.

2005 Illinois, detaining

For that the said defendant.., on the day of, 19.., at, in the county aforesaid, wrongfully detained the goods and chattels of said plaintiff.., to wit: (Describe same) of the value of dollars, and that, although often requested, said defendant.. ha.. refused, and still refuse.., to deliver the said goods and chattels above mentioned to the said plaintiff..

Wherefore, etc.

2006 Illinois, trover

For that whereas the plaintiff, on the day last aforesaid, in the county aforesaid, was lawfully possessed, as of his own property, of certain goods and chattels, to wit: (Describe property) situated in the on the of and streets, in the said city, of the plaintiff of the value of dollars; and being so possessed thereof, the plaintiff afterwards, to wit, on the same day, there casually lost the last mentioned goods and chattels out of his possession, and the same afterwards, to wit, on the same day, there came to the possession of the said defendant by finding; yet the defendant, well knowing the last mentioned goods and chattels to be the property of the said plaintiff, has not as yet delivered the same, or any part or either of them, or any part thereof, to the plaintiff, though often thereto requested, but has hitherto refused so to do, and afterwards, to wit, on

²⁵ This and the two subsequent Sections are used as one declaration.

the same day, here converted and disposed of the last mentioned goods and chattels to his own use.

Wherefore, etc.

2007 Maryland

For that the said defendants in the city of, state of Maryland, seized and took the goods and chattels of the said plaintiff, to wit, (Describe same) all of which were located in the city of, state of Maryland, of the value of dollars, current money, there and then found and being; and unjustly detained the same in the city of and state aforesaid against sureties and pledges, until, etc., whereupon the said, trading as aforesaid, says he is injured, and has sustained damages to the value of dollars, lawful money; thereupon, he brings suit, etc.

2008 Michigan, proof

The Michigan statute does not recognize the distinction between replevin in *cepit* or taking and that of in *detinet* or detaining, and admits, under the declaration, proof of an unlawful or wrongful taking as well as of a wrongful detention.²⁶ Under an ordinary or general form of declaration in replevin every question can be tried that is triable in an action of replevin.²⁷

2009 Michigan, Narr.

For that the said defendant on the day of, in the year of, at the in the county of, aforesaid, received the goods and chattels above mentioned, to wit, (Describe property) of great value, to wit, of the value of dollars, being of the goods and chattels of said plaintiff, to be delivered to the said plaintiff when the said defendant should be afterwards requested, and that the said defendant, although often requested so to do, has not delivered the goods and chattels above mentioned, or any part thereof, to the said plaintiffs, but has unlawfully detained and still does unlawfully detain the same.²⁸

2010 Mississippi

For that whereas, heretofore, to wit, on or about the day of, 19.., the said defendant bought of said plaintiff or its assignor certain furniture and house furnishings, and

²⁶ *Trudo v. Anderson*, *supra*; (10,653), (10,670), C. L. 1897. ²⁸ (10,670), C. L. 1897.

²⁷ *Riley v. Littlefield*, 84 Mich. 22, 26 (1890).

entered into a contract with the said plaintiff, a copy of which is hereto attached, by which the title to the said property should remain in said until fully paid for; that after making certain monthly payments the said defendant defaulted in said payment and has since said default refused wholly and absolutely to pay further under the said contract, although often requested so to do, and he still refuses so to do. By reason of the title having been so retained, plaintiff says that it is entitled to the immediate possession of said property described in said contract; that having been so entitled, it did on the day of, 19.., or thereabouts, cause a writ of replevin to issue from this court for the said property; and that said property is now in the possession of the officers of this court, neither party having given bond therefor. That by reason of said default in payment, defendant was bound to deliver up the possession of said property to the said plaintiff on demand; and that although repeated demands have been since made, he has refused and did so refuse up to the time the property was replevied, and that as a consequence of said wilful retention of said property when the said plaintiff was entitled to the same, plaintiff says that it has suffered damage in the sum of dollars. Wherefore, etc.

SPECIAL DEFENSES, PLEAS, ETC.

2011 Adverse possession

Exclusive, open, notorious adverse possession of the property replevied, under a claim and color of right acquiesced in for a long time is a good defense to an action of replevin.²⁹

2012 Avowry, plea (III.)

And for a further plea in this behalf the defendant says *actio non* because the said defendant by his attorney well avows the taking of said goods and chattels in said declaration mentioned in and upon the said lands in which &c., and justly, &c., because he says that, the plaintiff, *alias*, for a long time, to wit, for the space of one year next before and ending on the day of, 19.., and from thence until and at the time, when &c., held and enjoyed the said lands and premises in which &c., to wit, (Set out description) all in the county of and state of Illinois, by virtue of a certain demise thereof to him the plaintiff made at and under a certain yearly rent of dollars, payable as follows, to wit, dollars on the day of, 19.., and dollars due on the day of, 19.., and because the sum of dollars, part of the rent aforesaid for the space of one year ending as aforesaid on the day of, 19.., was due

²⁹ Richbourg v. Rose, *supra*.

and in arrear on the day of, 19.., and from thence and at the time, when &c., from the plaintiff to the defendant, he, the defendant, well avows the taking of said goods and chattels in and upon said lands in which &c., and justly &c., as for and in the name of a distress for said rent so due and in arrear to the defendant which said debt still remains in arrear and unpaid, and this the defendant is ready to verify; wherefore, he prays judgment and a return of said goods and chattels together with his damages according to the statute in such cases made and provided to be adjudged to him, &c.

(Maryland)

And the said, by, h.. attorney..., come.. and defend the wrong and injury, when &c., and well avows the taking of the goods and chattels aforesaid in the said place, &c., and justly &c., because he saith that the said avowant before the said time, when &c., was seized in his demesne as of fee of the same place, where the taking of the goods aforesaid is supposed to be, and being so thereof seized, it was agreed between the said avowant and the said plaintiff, before the time, when &c., to wit, on the day of, at the city aforesaid, that the said plaintiff should enter into part of the tract of land &c., in which &c., and should possess and occupy the said part &c., with &c., in which &c., for and during the space of one whole year from the said day of, in the year last aforesaid, until the day of then next following, fully to be complete and ended, and so from year to year, so long as it should please both parties aforesaid, the said plaintiff rendering and paying therefor, to the said avowant the sum of by virtue whereof the said plaintiff into the said part &c., wherein &c., entered the same, from the day and year last aforesaid, for following, had and occupied, and because the sum of of the rent aforesaid, for one whole year, ending on the day of next before the aforesaid time, when &c., was in arrear and not paid to the said avowant at the time, when &c., the said avowant well avows of the taking of the goods &c., aforesaid in the said place, where &c., and justly &c., for the said sum of to the said avowant in form aforesaid, being in arrear as in part of the said &c., which to the distress of the said avowant in form aforesaid, was charged and bound, and this he is ready to verify; wherefore, he prays judgment and a return of the goods aforesaid, to be adjudged to him &c.

.....
Attorney for avowant.

Notice to plead

To the plaintiff

Take notice that on the day of filing this avowry in the court of, a rule will be entered requiring you to plead thereto within fifteen days thereafter.

.....
Attorney for avowant.

JUSTIFICATION

2013 Attachment, court of record, plea (Ill.)

That one before the time, when, etc., to wit, on the day of, 19.., sued out of the court of the county aforesaid a certain writ of attachment of that date against one, directed to the sheriff of the county aforesaid, by which said writ the people of the state of Illinois commanded such sheriff that he attach so much of the estate, real or personal, of the said defendant,, to be found in his county, as shall be of sufficient value to satisfy a debt of dollars and cents, and costs, according to the complaint; and such estate so attached in his hands, to secure or so to provide that the same may be liable to further proceedings thereon according to law; and that he summon the said defendant,, to appear and answer the complaint of the said plaintiff at a term of said court of county to be holden at in the county of, upon the day of, 19..; and that he also summon such other persons as shall be required of him by the plaintiff as garnishees to be and appear at the said court on the said day of, 19.., then and there to answer what may be objected against them when and where he shall make known to the said court how he had executed the said writ; and that he have then and there this writ. Which said writ was thereupon, on the day of the date thereof, there delivered to the defendant, who then and from thenceforth, until at and after the said time, when, etc., was sheriff of the county aforesaid, to be executed in due form of law; by virtue of which said writ the defendant, as such sheriff as aforesaid, afterwards and before the return day of the said writ, to wit, on the same day in the said declaration mentioned being the time, when, etc., (and the said writ being then in full force and unsatisfied) there levied upon and took the said goods and chattels in the said declaration mentioned, and detained the same in the execution of the said writ; which are the same taking and detention in the said declaration above supposed, etc. And the defendant further says that the said goods and chattels in the said declaration mentioned, at the said time, when, etc., were the property of the said

and not of the plaintiff as by the said declaration is above supposed, and were subject to the levy of the writ of attachment, to wit, in the county aforesaid. And this the defendant is ready to verify; wherefore, etc.

2014 Attachment, justice court, plea (Ill.)

That, a corporation organized and doing business under and by virtue of the laws of the state of, by, its agent before that time, when, etc., to wit, on the day of, 19.., filed its certain complaint in writing on the oath of said, agent as aforesaid, before, then and there a justice of the peace in and for the county of and state of Illinois, in and by which said complaint it was charged that one was justly indebted to the said, in the amount of dollars and that the said concealed himself or stood in defiance of an officer so that process could not be served upon him; that he had departed from this state with the intention of having his effects removed from this state; that he was about to depart from this state with the intention of having his effects removed from this state; and that he was about to remove his property from this state, to the injury of the said; that he had within two years last past fraudulently conveyed or assigned his effects or a part thereof, so as to hinder and delay his creditors; that he had within two years last past fraudulently concealed or disposed of his property so as to hinder and delay his creditors; that he was not a resident of this state and that upon diligent inquiry affiant had not been able to ascertain the place of residence of the said And the said having given bond and security according to law, the said justice thereupon issued a writ of attachment against the said, directed to any constable of said county, by which said writ the people of the said state of Illinois commanded such constable that he attach so much of the personal estate of the said to be found in his county as should be of a value sufficient to satisfy the said debt of dollars, and costs, as in the said complaint alleged, and such personal estate so attached in his hands to secure or so to provide that the same may be liable to further proceedings thereon, according to law, before the above justice of the peace; that he summon the said to be and appear before the said justice of peace at his office in the town of, in the city of in said county, on the day of, 19.., at o'clock .. M.; and that he also summon as garnishees all persons whom the plaintiff or its agents should direct, to appear before the said justice at the same time and place, then and there to answer what may be objected against him or them; when and where he should make known how he had executed

the said writ, and that he have then and there the said writ; which said writ was thereupon on the day of the date thereof handed to one, who then and from thenceforth until at and after the said time, when, etc., was a constable duly qualified, commissioned and acting in and for the county of and state of Illinois, to be executed by him in due form of law. By virtue of which said writ said constable afterwards and before the return day of said writ, to wit, on the day of, 19.. (the said writ being then in full force and unsatisfied), there levied upon and took the said goods and chattels in the said declaration mentioned, the said goods and chattels being then in the charge and custody of the defendant subject to the levies of the defendant and the said constable in the pleas above mentioned, and detained the same in the execution of the said writ; and the said constable then and there presented and gave to the said defendant a copy of his said writ of attachment; and the said constable then and there duly constituted and appointed the said defendant herein his lawful custodian and guardian of said goods and chattels; and the said defendant thenceforth acted as such custodian and retained the possession of the said goods and chattels; which are the same taking and detention in the said declaration above supposed, etc. And the defendant further says that the said goods and chattels in the said declaration mentioned, at the said time, when, were the property of the said and not of the plaintiff, as by the said declaration above is supposed, and are subject to the levy of the said writ of attachment, to wit, in the county aforesaid. And this the defendant is ready to verify; wherefore, etc.

2015 Execution, court of record, plea (Ill.)

That and copartners doing business under the firm name and style of, before the said time, when, etc., to wit, on the day of, 19.., sued out of the court, of the county aforesaid, a certain writ of *fiery facias* of that date, against one, directed to the sheriff of the county aforesaid, by which said writ the people of the state of Illinois commanded such sheriff that of the goods and chattels, lands and tenements in his county, of the said, he should cause to be made the sum of dollars damages and the sum of dollars costs of suit, which by consideration of said court on the day of, 19.., the said, copartners as aforesaid, recovered against the said together with interest thereon at the rate of per cent per annum from the time of recovering the same as aforesaid, and also the further sum of dollars and cents, accruing costs on the said judgment; and that such sher-

iff should have the moneys ready to render to the said and, copartners as aforesaid, according to law, and should make return of the said writ in days after the date thereof; which said writ was thereupon on the said day of the date thereof there delivered to the defendant, who then and from thenceforth and until at and after the said time, when, etc., was the sheriff of the county aforesaid, to be executed in due form of law. By virtue of which said writ, the defendant as such sheriff, as aforesaid, afterwards and before the return day of the said writ, to wit, on the same day in the said declaration mentioned, being the said time, when, etc., (and the said writ being then in full force and unsatisfied) there took the said goods and chattels in the said declaration mentioned, and detained the same in execution of the said writ; which are the same taking and detention in the said declaration above supposed, etc. And the defendant further says that the said goods and chattels in the said declaration mentioned at the said time, when, etc., were the property of the said, and not of the plaintiff, as by the said declaration is above supposed, and were subject to execution, to wit, in the county aforesaid. And this the defendant is ready to verify; wherefore, etc.

Replication

And the plaintiff as to the plea of the defendant by him pleaded, justifying, etc., under and by virtue of a certain writ of *fiere facias*, says that she, the plaintiff, by reason of anything in that plea alleged ought not to be barred of having her aforesaid action, because she says the said goods and chattels in the said declaration mentioned at the said time, when, etc., were the property of, deceased, and not of, as he has above in that plea alleged. And this the plaintiff prays may be inquired of by the country, etc.

2016 Execution, justice court, plea (III.)

And for a further plea in this behalf, the said defendant says that the plaintiff ought not to have or maintain his aforesaid action against him, the said defendant, because he says that the a corporation before the said time, when, etc., to wit, on the day of, 19.., sued out of the justice court of county, aforesaid, a certain *fiere facias*, of that date, against, directed to any constable of the county aforesaid, by which said writ the people of the state of Illinois, commanded such constable that of the goods and chattels in his county, of the said he should cause to be made the sum of dollars, and the sum of dollars and cents, costs of suit, which by the said consideration of the said court, on, etc.,

a corporation recovered against the said together with interest thereon at the rate of per cent per annum from the time of recovering the same as aforesaid; and that such constable should have the same moneys ready to-render to the said, a corporation according to law, and should make return of said writ in seventy days after the said date thereof; which said writ, thereupon, on the said days of the date thereof, was then delivered to the defendant who then and from thence forth, until at and after the said time, when, etc., was constable of the county aforesaid, to be executed in due form of law; by virtue of which said writ, the defendant as such constable as aforesaid afterwards and before the return day of the said writ, to wit, on the same day in the said declaration mentioned being the said time, when, etc., and the said writ being in full force and unsatisfied, there took the said goods and chattels in said declaration mentioned, and detained the same in execution of said writ, which are the same taking and detention in the said declaration above supposed, etc.

And the said defendant further says, that the said goods and chattels in the said declaration mentioned at the said time, when, etc., were the property of the said and not of the plaintiff as by the said declaration is above supposed, and were subject to execution, to wit, in the county aforesaid. And this the defendant is ready to verify; wherefore, etc.

2017 *Non cepit* and *non detinet*, scope

The return of property replevied cannot be obtained under a plea of *non cepit* or *non detinet* in an action of replevin, as neither plea denies the property in the plaintiff.³⁰ A plea of *non detinet* entitles the defendant to prove that the plaintiff has no right to the possession of the property.³¹

2018 *Non cepit*, plea (Ill.)

And the defendant, by his attorneys, comes and defends the wrong and injury, when, etc., and says he did not take the said goods and chattels in the said declaration mentioned, or any or either of them, or any part thereof, in manner and form as the plaintiff in his declaration hereof has complained against him; and of this he puts himself upon the country.

2019 *Non detinet*, plea (Ill.)

And as to the (second) count of the said declaration, the defendant.. say.. that ..he.. did not wrongfully detain the

³⁰ Chandler v. Lincoln, 52 Ill. 74, 76 (1869).

³¹ Constantine v. Foster, 57 Ill. 36, 39 (1870).

goods and chattels in the said (second) count mentioned, or any or either of them or any part thereof, in manner and form as the plaintiff ha.. above thereof in that count complained against ..he..; and of this ..he.. putsel.... upon the country, etc.

2020 Property in defendant or third person; practice, proof

The proper remedy to procure a return of replevied property and to compel the plaintiff to prove title in the first instance is to plead property in the defendant or a third person and to traverse the plaintiff's allegation of right of property or title. The single averment of property in defendant or a third person without traversing the right of property is mere inducement to the traverse of the plaintiff's right, on which the plaintiff cannot take issue, and is insufficient to cast the burden of proof on him.³² A plea of property in defendant, with a denial of the right of property in plaintiff, puts in issue only the right of property in the plaintiff, the allegation of property in defendant being merely inducement to the formal traverse of the right of property in the plaintiff and is not traversable or triable.³³ Under this plea evidence of title in a stranger or a third person is admissible, although the plea does not disclose the name of such person.³⁴

2021 Property in defendant, plea (Ill.)

That the said goods and chattels in the said counts of said declaration mentioned, at the same time, when, etc., were the property of him, the defendant, and not of the plaintiff, as by the said declaration is above supposed; and this the defendant is ready to verify. Wherefore, he prays judgment if the plaintiff ought to have his aforesaid action against him, the defendant, in the said county mentioned; and he also prays a return of the said goods and chattels, together with his damages and costs in this behalf, according to the form of the statute in such case made and provided, to be adjudged to him, etc.

Replication

That the said goods and chattels in the said declaration mentioned, at the same time, when, etc., were the property of it, the plaintiff, and not of the defendant, as he has above in said

³² Chandler v. Lincoln, *supra*.

³⁴ Constantine v. Foster, 57 Ill.

³³ Constantine v. Foster, 57 Ill. 38, 39.

plea alleged; and of this he puts himself upon the country, etc.³⁵

2022 Property in defendant, trust or monopoly; plea (Ill.)

That on, to wit, the day of, 19.., and for several years prior thereto, the defendant,, was doing business in the city of, in the county of and state of Illinois, under the name and style of and sometimes under the name and style of, and was engaged in the manufacture of fruit butters, jellies, preserves, and like products for sale, and that the greater portion of said goods and chattels in the declaration mentioned were then and there the property of the defendant, and owned and used by him in carrying on his said business as a manufacturer in the state of Illinois, and the residue of such goods and chattels in the declaration mentioned were articles subsequently bought and purchased by defendant to be used in the carrying on of his said business, under the name and style of, sometimes known as, as a manufacturer in the state of Illinois, as aforesaid.

And that on, to wit,, 19.., at the place aforesaid, approached the said defendant, and laid before him a scheme to form a "trust" to be called the trust, which trust was to be organized for the purpose of bringing into one combination all the manufacturers throughout the United States of fruit butters, jellies, preserves, and like products, which are staple articles of food, and are in general use and demand as articles of food by the inhabitants and the people of the state of Illinois, and of the United States, and to raise the price of such products, to prevent competition and to secure a virtual monopoly thereof, and to crush out any manufacturer who would not join said "trust;" and the said defendant then and there refused to enter into any such combination; and then and there said told the defendant that unless the defendant joined the said "trust," the same would ruin his business, and force him out of business.

That upon, to wit, the day of, 19.., said, the now secretary of said plaintiff pretended corporation, and a confederate of said, came to the defendant and stated to him that all the leading manufacturers in the United States of fruit butter, jellies, and like products had signed, or had agreed to sign such "trust" agreement, and that if any such manufacturer did not sign such agreement, he would be forced out of business, and his business would be ruined; and the said defendant, fearing that

³⁵ A plaintiff must take issue on the traverse and not on the inducement of a plea of property in the

defendant or a third person. *Chandler v. Lincoln*, 52 Ill. 76.

the said threats would be carried into execution, on, to wit, the day of, 19.., and at the place aforesaid, signed said "trust" agreement: which said "trust" agreement provided that the trust created shall be vested in trustees; that (Name them) be appointed trustees, and that said trustees be directed, authorized and empowered to select and choose the other trustees; and that the trustees should prepare certificates, known as certificates and should have power to agree upon and direct the form and contents of the certificates, and the mode in which they should be executed, attested and transferred; that the certificates should be issued for property, bonds, stock, money or business sold and transferred to the said "trust."

The said agreement further provided that each subscriber thereto shall assign and transfer absolutely to said trustees, all of the shares of the capital stock which such subscriber may own in the following named corporations, to wit, (Insert names) whether said corporations then existed, or whether they were to be afterwards organized; and that several of said last named companies were engaged in the manufacture and sale of similar articles of food to those manufactured by defendant, as aforesaid, and were competitors with defendant in that business.

And said agreement further provided, that said trustees and their successors should have the power to purchase other stocks and bonds of the above mentioned companies, or of other companies organized for, or engaged in conducting like businesses, and to purchase the property of any company, association, partnership or individual engaged in like business, and to issue therefor certificates of trust, with intent thereby to place the management of each and all of said several companies and all other corporations to be organized for said purposes, under the power and control of said trustees, and thereby prevent competition in such business.

And the agreement further provided that all stocks and bonds so sold and transferred to said trustees should be held by the said trustees, and their successors, for the benefit of all the owners of said trust certificates; that no stocks so held by said trustees be sold or surrendered by the said trustees without the consent of a majority in number and value of the holders of trust certificates; that said trustees should have the power to cause corporations to be formed to act as agents for the purchase of the business of individuals and partnerships engaged in the manufacture and sale of said staple articles of food and to transfer the shares of stock in such corporations so organized, as aforesaid, to the said trustees; and that the said trustees should receive and safely keep all moneys received from dividends, or interest upon stocks, bonds, or moneys held in trust, and should distribute the same, as well

as all moneys received from the sale of trust property, by declaring and paying dividends upon said trust certificates.

Said agreement further provided that the trustees should exercise supervision over the several corporations or associations whose stock is held by the said trustees; that the said trustees, as stockholders of said corporation, should elect directors and officers of the various corporations aforesaid, and have the power to elect themselves as officers and directors of such corporations; that said trustees might employ and pay all such agents or attorneys as they might find it necessary to employ in the management of said "trust;" that the trustees should be elected by ballot by the owners of said trust certificates, or their proxies; and that whenever any change should occur in the board of trustees, the legal title to the stock and other property held in trust shall pass to, and vest in the successors of said trustees without any formal transfer.

Said agreement further provided, that should any party or parties holding certificates of said "trust," or being a lessor of, or desirous of operating an establishment controlled by the said "trust," or should such party be desirous of forming an establishment similar to those controlled by said "trust," then such party, upon making application to the board of trustees for such privilege, stating in said application the estimated time during which he or they may desire to operate such establishment, the privilege may, in the discretion of the board of trustees be granted, on the following terms:

1. That the party or parties seeking such privilege shall pay monthly to the treasurer of the "trust," a profit on all goods manufactured in such privileged establishment, and that said profit shall equal at least the average profit which the "trust" has derived from all the other establishments operated by it for the period of time covered by such privilege.

2. The party or parties privileged shall bear all expense incidental to putting that establishment in condition to operate, and furnish all capital needed to operate the same.

3. The party or parties privileged shall furnish to the "trust" ample and satisfactory surety for the monthly payment of the above mentioned profits.

4. The trust shall at all times retain control over such establishment, and shall cancel such privilege whenever the trustees shall deem fit.

Said agreement provided that the said trust certificates should certify that the holders thereof should be entitled to share in the equity to the property held by the trustees of the "..... trust," transferable only on the books of said "trust" on surrender of a certificate, and that said trustees should have power to increase the amount of trust certificates to the extent of the increase or accumulation of the profits.

That at the same time when the said defendant signed the said trust agreement, to wit, in, 19.., said,

one of said trustees mentioned in said trust agreement, at defendant's place of business in said city of, caused an inventory to be made of his merchandise, stock in store and entire equipment connected with his said business, and appraised the same at the sum of dollars and cents, and informed the defendant that he would have to assign and transfer the same by bill of sale to the "..... trust," and that at the time and place last aforesaid, said directed the defendant to open a new set of books in the name of the "..... trust," which the defendant then and there did.

That pursuant to said scheme, to wit, upon the day of, 19.., the said trustees caused, or attempted to cause, a pretended corporation to be organized under and by virtue of the laws of, under the name and style of the "..... company," with a capital stock of dollars, which is the plaintiff in this suit, and that the pretended incorporators of said company were, namely: (Name them), all of whom were trustees of said "..... trust."

That subsequently, to wit, in, 19.., said came to the defendant's said place of business in said city of, and stated to the said defendant, that to carry out the scheme of said "trust," it was necessary for the said defendant to execute a bill of sale of his business inventoried, as aforesaid, to the "..... company," the pretended corporation organized under the laws of the state of, by said trustees, for the purpose of having a channel through which said trust could purchase and control the business of the defendant, and purchase and control the entire manufacturers of fruit butters, jellies, preserves, and articles of a like kind; and then and there, at the time and place last mentioned, said handed to the defendant a certain bill of sale already drafted running to the said pretended "..... company" as vendee, of the articles inventoried, as aforesaid, and then and there directed the defendant to execute the same, as part and parcel of said scheme for the organization of said "trust;" which the said defendant then and there, in said county of, in the state of, under the compulsion and threats of said, executed; and also then and there the said handed to the defendant, to wit, shares of stock in the said pretended "..... company," of pretended par value of dollars, and directed the defendant to assign said shares to the said trustees of the said "trust;" which the defendant, under said direction, and by compulsion and threats, then and there did. That at the time of the execution of said bill of sale, said took said certificates of stock so assigned under the direction and compulsion of said, and handed to defendant, to wit, certificates of trust in said ".....

trust," of the pretended par value of dollars, which were known as "..... certificates."

And the defendant avers that the said bill of sale to said "..... company," was by it and its said agents and representatives, acting in its behalf, procured to be made to said company to aid said "..... trust" as one of the agents and instruments employed and controlled by said trustees of the said "..... trust," to control the entire manufacture and sale of fruit butters, jellies, preserves, and like products throughout the United States and to create a virtual monopoly of such manufacture and sale, and to prevent competition in the manufacture and sale of said products, which the defendant avers are staple articles of food as aforesaid.

And the defendant avers that the said pretended title acquired by the defendant under said bill of sale and trust agreement, is the only title that said plaintiff ever acquired or had to any of the said goods and chattels in the declaration described, and to the articles named in said bill of sale, and to the business, property, and good will of the defendant's said business; and that the procuring of the execution of said bill of sale, as aforesaid, was a part of said scheme for the organization of said "trust," and the prevention of competition in the manufacture and sale of fruit butters, jellies, preserves, and the like products, as aforesaid, and for the raising of the market price of the same, and for the securing of a virtual monopoly therein, under the control of said ".....," as aforesaid.

And the defendant avers that the trustees of the "..... trust," and the plaintiff, by their agents, after procuring the defendant to so sign said trust agreement, and to execute said bill of sale to plaintiff, as aforesaid, permitted and required said defendant to carry on said business of manufacturing and selling fruit butters, jellies, preserves and like products at his said place of business in county,, under the name and style which said defendant had formerly carried on said business, to wit, company or company and to account to, and make returns thereof to said plaintiff, or to said trustees of said "..... trust," and with which said requirements so imposed, as aforesaid defendant accordingly complied until the time, when, etc., as is hereinafter mentioned.

The defendant avers that the said company, said pretended corporation, was organized to carry out the purposes of said "trust," and was the mere tool or agent of said trust, and was the mere channel through which said "trust" acquired title to the business and property of this defendant, in the state of Illinois, and of other manufacturers of fruit butters, jellies, preserves and like products, and to the property of corporations engaged in like business; and that it

was not intended by the incorporators of said company, that said company should have an independent existence as a corporation, but said plaintiff company submitted itself to be used, and was used, as a mere convenient receptacle in which to vest the interests of individuals, partnerships, and corporations engaged in manufacturing jellies, preserves, fruit butter and like products, and thereby place the same under the management and control of said "..... trust," and that to accomplish this end the whole, or at least a majority and controlling interest in the shares of stock in said company, were issued by said plaintiff, or by it transferred to, and held by the said trustees of said "..... trust," as aforesaid.

The defendant avers, that, on, to wit,, 19.., he tendered said trust certificates to the general manager of the "trust," and demanded that the said "trust" return to him the articles inventoried in said bill of sale, which the said general manager then and there refused to do; whereupon, defendant refused to make any further reports to the said "trust;" and that on, to wit,, 19.., the defendant again presented his said trust certificates to the said trustees for cancellation, and demanded a return of the property and business taken from the defendant, as aforesaid; and that thereupon, the president of the said trust called upon the defendant, and by threats and persuasion induced the defendant to continue making reports of said business; which reports defendant continued to make until, to wit, the of, 19..

Defendant further avers, that, on, to wit,, 19.., a representative of said trustees came to the defendant and asked the defendant to return said certificates of trust, and to take in lieu thereof, to wit, shares of stock in said pretended corporation, the company, stating that all the members of said "trust" were going into said company; which the defendant refused to do, because the defendant avers that the said company was the mere agent of said trustees in and about the organization of said "trust;" and that he was informed, and verily believes, and so states the fact to be, that the said trustees sought to avoid the appearance that the said "trust" was a partnership of corporations, by cancelling the said trust certificates, and abandoning the charters of the various corporations organized by said "trust," except the said company, and intending to give to the stockholders in such corporations whose charters were to be abandoned, shares of stock in said company to be held and controlled by said trustees of the "..... trust," as trustees for the stockholders of said company, for which purpose said trustees of said "trust" caused the capital of the plaintiff to be increased

thereby substituting said company in the place of said "..... trust."

And this defendant avers that said "trust," whether under the name of said "..... trust," or of said company, is a combination organized for the purpose of bringing into said combination all manufacturers throughout the United States of fruit butters, jellies, preserves and like products, to raise the price of such products, to prevent competition therein, and to secure a virtual monopoly thereof, and is therefore contrary to public policy, and void in law; for which reasons, the defendant then and there refused to return the said certificates of trust for such purpose.

That upon, to wit,, 19.., the defendant was advised that his said trust agreement was illegal, and since said time last named, the defendant has not rendered any reports to said "trust." All of which acts and doings of the plaintiff above pleaded the defendant avers are contrary to public policy and void in law; and so the defendant in fact saith that the goods and chattels in the said counts of the declaration mentioned, at the time, when, etc., were and are the property of him, the defendant, and not of the plaintiff, as by the said declaration is above supposed. And this the defendant is ready to verify.

Wherefore, he prays judgment if the plaintiff ought to have his aforesaid action against him, the defendant; and he also prays the return of the said goods and chattels in the counts of the declaration mentioned, together with his damages and costs in this behalf sustained, according to the form of the statute in such cases made and provided to be adjudged to him.³⁶

Replication

That, on, to wit,, 19.., this plaintiff was legally and duly incorporated under and by virtue of the laws of, and thereupon and thereby became, and has since continued to be and now is a duly chartered and legally existing corporation; that since the incorporation of this plaintiff its stock, to the amount of dollars, has been subscribed and paid for; that the capital of this plaintiff has been and is employed in the manufacture of mince meat, fruit butters, jellies and preserves, and all articles of commerce connected therewith or relating thereto, and dealing in the same, which is the purpose of said incorporation as stated in this plaintiff's charter; that subsequent to the incorporation of this plaintiff, to wit, in, 19.., this plaintiff in consideration of shares of its capital stock then and there delivered to said de-

³⁶ Bishop v. American Preservers' Co., 157 Ill. 284, 307 (1895).

fendant, purchased of said defendant a certain plant, consisting of machinery, tools and stock in trade then and theretofore used and employed by said defendant in his business as a manufacturer of and dealer in mince meat, fruit butter, jellies and preserves, which said plant, machinery, tools and stock in trade were then and there, by said defendant, sold and delivered to this plaintiff, in consideration of the aforesaid shares of the capital stock of this plaintiff; that after this plaintiff had so as aforesaid delivered said shares of stock to said defendant, and after said defendant had delivered said plant, machinery, tools, and stock in trade to this plaintiff, this plaintiff entered into an agreement with defendant, whereby plaintiff employed defendant to act as its agent in carrying on, conducting and managing said business, and defendant, in consideration of a certain compensation then agreed by plaintiff to be paid to defendant, undertook and agreed to take charge of said plant and manage and conduct said business under the direction of plaintiff and as its agent; that under and pursuant to said agreement, plaintiff, on, to wit,, 19.., placed defendant in charge of said machinery, tools and stock in trade, and thereafter defendant conducted said business under the direction of plaintiff and as its agent, and was paid and received his agreed compensation therefor, until, to wit,, 19..; that during the time that defendant so operated said business for and as the agent of this plaintiff, additions, repairs and improvements were by said defendant, under the direction of plaintiff made to said machinery and tools, and said stock in trade was sold and replaced by other stock in the usual course of dealing; that said machinery and tools, with the repairs, additions and improvements thereto, and said stock in trade with the additions thereto and substitutions therefor, are the identical goods and chattels mentioned and referred to in the declaration filed herein; that, on, to wit,, 19.., said defendant, in disregard of his duties and obligations as the agent of this plaintiff, attempted to assert in himself title to and ownership of said goods and chattels, and refused to longer recognize the title of this plaintiff thereto, and refused to account as agent of this plaintiff, and refused to surrender said goods and chattels to this plaintiff; that this plaintiff was organized and incorporated, and since its organization and incorporation has continued to exist as an independent corporate entity, having no connection with said alleged "..... trust;" without this, that this plaintiff was organized for the purpose of becoming a tool or agent of said alleged "..... trust," or a channel through which said trust could acquire title to said goods and chattels, or that plaintiff was at any time the agent, tool, or confederate of said "trust," or that it purchased, took or held said goods and chattels as the agent or tool of said trust, or that said "trust" ever had or has any

interest in the said goods and chattels, or any interest in the control and management of said business or the proceeds and profits arising therefrom, or that the sale of said goods and chattels by defendants to plaintiff, or the execution of the bill of sale therefor, was induced or procured through threats and persuasion, or that plaintiff is a trust or monopoly, or that its purchase of said goods and chattels or the conduct of said business was a part of a scheme to form a "trust" or monopoly and enhance prices of the said goods. And of this plaintiff puts itself upon the country, etc.

2023 Property in third person; plea (Ill.)

That the said goods and chattels in the said declaration mentioned at the said time, when, etc., were the property of one, and not of the plaintiff as by said declaration is above supposed. And this the defendant is ready to verify; wherefore, (as in Section 2021).

Replication

That the goods and chattels in said declaration mentioned, at the said time, when, etc., were the property of him, the said plaintiff and not of the said, as the defendant has above in those pleas and each of them alleged. And of this he puts himself upon the country, etc.

2024 Recoupment, distrained property, replication requisites

In replevin to regain possession of property which has been distrained and to defeat the levy of the distress warrant set up by plea, the plaintiff or tenant must specifically aver in the replication that there have been breaches of contract of the lease on the part of the defendant or landlord which produce damages equal to or greater than the amount of the rent claimed to be due, and that there is therefore no rent due to the defendant.³⁷

2025 Set-off and recoupment, pleading

Unliquidated damages which arise out of the transaction sued upon may be set up by way of recoupment in an action of replevin.³⁸ In Michigan, neither set off nor recoupment is pleadable, as the only issue in actions of replevin is the plaintiff's right to the possession of the property in dispute.³⁹

³⁷ Lindley v. Miller, 67 Ill. 248.

v. Thompson, 156 Mich. 365, 369 (1909).

³⁸ Lindley v. Miller, 67 Ill. 247.

³⁹ Dearing Water Tube Boiler Co.

2026 Special damages, pleading

Special damages suffered from the service of a writ of replevin, although actual, are not recoverable under the plea of the general issue, but must be specially pleaded. In Michigan special damages in such a case must be covered by notice under the general issue.⁴⁰

GENERAL ISSUE

2027 General issue, scope

In an action of replevin a plea of not guilty puts in issue the plaintiff's right to the possession of the property replevied and its wrongful taking and possession.⁴¹

2028 District of Columbia

Now comes the defendant and says that he is not guilty in manner and form as is in said declaration alleged.

.
Attorney for defendant.

2029 Maryland, plea

1. That it did not take the goods and chattels of the plaintiff, as mentioned in the declaration.

2. That at the time of the issuing of the writ in this case, the property in the goods and chattels mentioned in the declaration was in said defendant

3. That at the time of the issuing of the writ in this case, the plaintiff had no property in the goods and chattels mentioned in the declaration.

Replication

1. To the first section of the defendant's plea, that he joins issue.

2. To the second section of the defendant's plea, that at the time of the issuing of the writ in this case the property in the goods and chattels mentioned in the declaration was not in the defendant, the, but in the plaintiff, as alleged in the declaration.

3. To the third section of the defendant's plea, that he joins issue.

2030 Mississippi

Now comes the defendant, by his attorney, and for a plea to the plaintiff's declaration says that he is not guilty of the said

⁴⁰ Bateman v. Blake, 81 Mich. 227, 231 (1890).

⁴¹ Richbourg v. Rose, *supra*.

supposed wrongs alleged against him in said declaration, or any part thereof; and of this the defendant puts himself upon the country.

VERDICT

2031 Florida

We, the jury, find that the defendant wrongfully withholds the property mentioned in the declaration from the plaintiff, and that the plaintiff is the owner of said property and that he is entitled to the possession of the same. We also find for the plaintiff dollars, attorneys' fees. So say we all.
, Foreman.

2032 Illinois

We, the jury, find the defendant guilty and the right to the possession of the property in question in the plaintiff, and assess the plaintiff's damages at the sum of dollars.

b

We, the jury, find the issues for the defendant and that the right to the possession of the property in question is in the defendant.

2033 Mississippi

We, the jury, find for the plaintiff and assess the value of the property as follows, to wit: (Enumerate, itemize and give value of each article).

JUDGMENT

2034 Illinois requisites

A judgment in plaintiff's favor in replevin should award the property to him, or it should assess damages for its value. It should not attempt to award the property and also assess damages. But the fact that a judgment erroneously awards property and damages to the plaintiff will not render the judgment invalid, if there was no property taken by the replevin writ.⁴²

2035 Illinois, defendant

⁴³ Therefore it is considered by the court that the defendant do have and recover his costs and charges in this behalf expended and have execution therefor, and that a *retorno habendo* do issue herein for the return of the property replevied by virtue of the writ of replevin issued in said cause.

⁴² Greenberg v. Stevens, 212 Ill. 611.

⁴³ Precede this by recital of appearances, etc.

b

This cause coming on to be heard upon plaintiff's motion heretofore entered herein for a new trial, and both parties being represented in court by counsel, after argument of counsel and due deliberation by the court, said motion is overruled and a new trial denied; to which ruling plaintiff then and there duly excepted.

Thereupon, it is considered by the court, and it is so ordered, that the plaintiff do make return within days herefrom of the property seized under authority of the replevin writ heretofore issued in this cause, and in default of such return, that the defendant do have and recover of and from the plaintiff the sum of dollars and cents (\$.....), said sum being the amount of the judgment with taxed costs (for which said property was rightly held under and by virtue of a writ of execution at the time it was seized as aforesaid), together with interest thereon at the rate of per cent per annum, from the day of, 19.., to the day of, 19..

And in default of the return by the plaintiff of the property in accordance with this order, it is further ordered that the defendant have execution for said sum of dollars and cents (\$.....).

To the entry of which said judgment the plaintiff duly excepts and prays an appeal therefrom to the appellate court for the district of Illinois, which is allowed by the court upon the plaintiff's filing his bill of exceptions within days herefrom and an appeal bond in the sum of dollars (\$.....) within days herefrom, with surety to be approved by the court upon due notice to the defendant's attorney.

Dated, etc.

Enter

.....
Judge.

2036 Michigan, nature and requisites

In Michigan a defendant can only recover the following judgments: (1) a judgment for the return of the goods replevied and the damages sustained by him by reason of the detention; (2) a judgment for the value of the property replevied, if a return is waived; or, (3) a judgment for the costs alone if no property has been replevied or delivered to the plaintiff.⁴⁴ A judgment for the value of the property in favor of the defendant in replevin must specifically show an election by the defendant to take a judgment for the value instead

⁴⁴ Bateman v. Blake, 81 Mich. 233.

of a judgment for the return of the property, the latter being the necessary judgment, unless such an election appears from the judgment.⁴⁵

2037 Michigan, defendant

This cause having been heretofore duly tried before the court without a jury and submitted to the court for its further consideration and a request for written finding of facts and law made, and the court having had mature deliberation thereon and having found by its findings this day filed that the said defendant did not unlawfully detain the goods and chattels as the said plaintiff hath in his declaration alleged against him; therefore, it is considered that the said plaintiff take nothing by his suit and that said defendant do go thereof without day, and that defendant have a return of the goods and chattels in said plaintiff's declaration specified; and it is further considered that the said defendant do recover against the said plaintiff his costs and charges by him about his defense in this behalf expended and taxed; and that the said defendant have execution therefor.

Read, approved and signed in open court this day of 19...

2038 Mississippi, plaintiff

⁴⁶ It is therefore ordered by the court that the said plaintiff do have and recover from the defendant the property above named together with costs of suit; or in lieu of said property that the said plaintiff do have and recover from the said defendant and his bondsmen and the said sum of dollars and costs of suit.

b

⁴⁶ It is therefore considered and so ordered by the court that the plaintiff do have and retain possession of the (Describe property) mentioned in the writ of replevin herein; and it is further considered by the court that the said plaintiff.. do have and recover of and from the defendant his costs in this behalf expended to be taxed; for which let execution issue.

⁴⁵ Adams v. Champion, 31 Mich. 233, 235 (1875).

⁴⁶ Precede this by recital of appearances, etc.

CHAPTER XXIX

TRESPASS

IN GENERAL

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IN GENERAL

2039 Action, force

Any unlawful exercise of authority over the goods of another will support trespass, although no force is exerted.¹

2040 Quare clausum fregit, possession

Trespass *quare clausum fregit* can be maintained only by the party whose actual or constructive possession has been disturbed or invaded, as possession at the time of the disturbance or invasion is essential to the maintenance of the action.² Constructive possession is sufficient to give a right of action of trespass *quare*

¹ Chicago Title & Trust Co. v. Core, 223 Ill. 58, 62 (1906).

² Galt v. Chicago & Northwestern

Ry. Co., 157 Ill. 125, 132, 134 (1895); Halligan v. Chicago & Rock Island R. Co., 15 Ill. 558 (1854).

clausum fregit where there is no adverse possession, on the principle that ownership draws to it the possession. But the owner must seek another remedy (ejectment) where there is adverse possession.³ The plaintiff must show actual possession of the premises when they are occupied, and a legal title with the right to immediate possession, or other facts showing constructive possession, when the premises are vacant.⁴ The injury to the possession is the gist of an action of trespass *quare clausum fregit*.⁵

PARTIES

PLAINTIFFS

2041 Grantee

The grantee of land cannot acquire the grantor's right of action for a trespass to the land, even by written assignment, as the right to bring an action of trespass to land is personal and is not assignable or transferable.⁶

2042 Lessee

A lessee has a right of action against the wrong-doer for such damages as he sustains in his leasehold interest, regardless of any right of action in the owner of the fee for damages to the reversionary interest.⁷

2043 Owner and occupant, husband and wife

Parties who are holding by different titles, one having the freehold and the other merely possession, cannot join in bringing the action of *quare clausum fregit*, even where they are husband and wife and the husband furnishes the money for the purchase of the property.⁸

³ Cook v. Foster, 2 Gilm. 652, 655 (1845).

⁴ Rawson v. Finlay, 27 Mich. 268, 270 (1873).

⁵ Halligan v. Chicago & Rock Island R. Co., 15 Ill. 559.

⁶ Galt v. Chicago & Northwestern Ry. Co., *supra*; Chicago & Alton R. Co. v. Maher, 91 Ill. 312, 315 (1878).

⁷ Carter v. Cairo, Vincennes & Chicago Ry. Co., 240 Ill. 152, 157, 158 (1909); Indianapolis, Bloomington & Western Ry. Co. v. McLaughlin, 77 Ill. 275, 278 (1875).

⁸ Indianapolis, Bloomington & Western Ry. Co. v. McLaughlin, *supra*.

2044 Reversioner

Trespass *quare clausum fregit* is maintainable by the owner for a permanent injury to the freehold, where the land is in possession of a tenant at will.⁹

DEFENDANTS

2045 Principal and accessory

All persons who are concerned in any manner with a trespass are principals; there are no accessories in trespass.¹⁰

DECLARATION REQUISITES

2046 Consent

It is sufficient to allege that the trespass was committed without the plaintiff's consent; leaving the defendant to set up the consent of some third authorized person, if such is the case.¹¹

2047 Closes, different

An allegation of a single trespass to two or more closes is allowable.¹²

2048 Possession

In an action of *quare clausum fregit*, the declaration must clearly show that the plaintiff had actual or constructive possession of the premises, or some part thereof, at the time of the injury.¹³

SPECIAL CAUSES AND DECLARATIONS

2049 Assault and battery, Narr. (D. C.)

¹⁴ For that on or about the day of, the defendant at and in his saloon, which is located at in the city of, District of Columbia, did assault and commit a battery upon plaintiff, at the place and the time aforesaid by throwing with great violence a heavy beer glass, the said beer glass striking plaintiff in the forehead, thereby

⁹ Davins v. Nash, 32 Me. 411 (1851); Halligan v. Chicago & Rock Island R. Co., 15 Ill. 560.

¹⁰ Olsen v. Upsahl, 69 Ill. 273, 275 (1873).

¹¹ Pratt v. Davis, 224 Ill. 300, 306 (1906).

¹² Halligan v. Chicago & Rock Island R. Co., 15 Ill. 559.

¹³ Halligan v. Chicago & Rock Island R. Co., 15 Ill. 560.

¹⁴ See Section 211, Note 60.

fracturing plaintiff's skull, and did cause plaintiff great physical and mental suffering on account of the assault and battery aforesaid. By reason of the said assault, plaintiff was taken to the hospital in said city, and was compelled to remain there under treatment for days, during all of which time plaintiff suffered great agony both physical and mental and during all that time it was not known whether he would recover or die from the result of said assault. The aforesaid assault which was perpetrated by the defendant in this cause upon plaintiff was committed upon the plaintiff without any cause of provocation whatsoever on the part of the plaintiff. The said assault was wilful, wanton, and malicious and without any justification whatsoever on the part of defendant.

As a result of said assault plaintiff has been put to great expense and is now hindered and prevented from properly attending to his daily affairs; plaintiff's forehead has been permanently disfigured by reason of a large ugly scar which has been left upon plaintiff's forehead as the result of the aforesaid assault; plaintiff has, since the said assault was committed upon him, suffered almost continually from violent pains in that part of his head upon which he was struck with the beer glass by the defendant in this cause, and is now suffering great pain from the brutal and malicious assault and battery committed upon him by the said defendant as well as great mortification and agony of mind.

By reason of the premises whereof the plaintiff has been greatly damaged and was put to great expense and trouble and is now hindered and prevented from properly attending to his daily affairs and has been and is otherwise greatly damaged in the full sum of dollars, and plaintiff claims, etc.

(Maryland)

For that, on or about the day of, 19.., in county, Maryland, the defendant violently assaulted and beat the plaintiff, inflicting severe and painful injuries upon said plaintiff.

And the plaintiff claims

b

For that on the day of, 19.., at in county, Maryland, the defendant,, who was then and there a servant and employee of the defendant corporation, in the regular course of his said employment, recklessly and wantonly assaulted, beat and bruised the plaintiff, whereby the said plaintiff was severely and seriously wounded and injured, and permanently marked and scarred, and suffered great indignities, and was deprived of earning

a livelihood for a long time, and was put to a great expense in and about the care of his said wounds and injuries.

And the plaintiff claims dollars damages.

c

For that the defendant is a corporation owning and operating a railroad for the carriage of passengers for reward between the town of,, county, in the state of, and the city of, in county, in said state, and that the defendant owns a station (and approaches thereto), in which there is a waiting room for the accommodation of passengers and of persons intending to become passengers on the cars of the said defendant, which said station is located near the roadbed and tracks of the said defendant at the city of, aforesaid; that the equitable plaintiff was on one of the approaches of the defendant to its said waiting room and station at the city of aforesaid, on the day of, 19.., for the purpose of taking passage on one of defendant's trains to the town of, aforesaid, that while he was on one of said approaches to said station and waiting room, for the purpose aforesaid, one of defendant's agents, officers or employees, then and there in charge of said station, waiting room, grounds and approaches thereto then and there, with force and arms, did violently assault and unlawfully and maliciously did then and there beat, wound and ill treat and falsely arrest and imprison the equitable plaintiff in the lock-up or jail in the city of, aforesaid, in consequence whereof the said equitable plaintiff suffered great distress of mind, was greatly humiliated, and sustained severe bodily harm and injury and his reputation in the community where he lives, has been greatly injured thereby.

And the plaintiff claims therefor dollars damages, and thereupon brings suit.

(West Virginia)

For this, to wit, that therefore, to wit, on the day of, in the year 19.., the said defendant, at the county of aforesaid, with force, made an assault upon him, the said, the said plaintiff, and then and there, with great force and violence, beat, bruised, and ill-treated him, and with his hands and fists gave and struck the said plaintiff a great many violent blows and strokes on and about divers parts of his body; and also then, with great force and violence, cast, threw and knocked the said plaintiff to the floor and violently kicked him, and gave and struck him a great many other blows and strokes. By means of which said several premises, the said plaintiff was then greatly hurt,

bruised and wounded, and became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto; during all which time, the said plaintiff thereby suffered and underwent great pain and was hindered and prevented from performing and transacting his necessary affairs and business, and also thereby the said plaintiff was obliged to pay and did necessarily pay and expend a large sum of money, to wit, the sum of dollars (.....) in and about endeavoring to be cured of his wounds, bruises, lameness, sickness, soreness, and disorder aforesaid occasioned by the said defendant aforesaid.

And also for this, to wit, that afterwards, to wit, on the day and year aforesaid, the said defendant, with force, made another assault on the said plaintiff, and again beat, bruised, wounded and ill-treated him.

And other wrongs and injuries, then and there, the said defendant did to the said plaintiff to the great injury and damage of the said plaintiff. Wherefore the said plaintiff says that he is injured, etc.¹⁵

2050 Burning adjacent houses, damage to reversion, Narr. (Ill.)

For that whereas before and at the time of the grievance and injury hereinafter mentioned, certain premises, to wit, two cottages with the appurtenances situate in the county of, were respectively in the respective possessions and occupations of certain persons as tenants thereof to the plaintiff, to wit, one thereof in the possession and occupation of as tenant thereof to the plaintiff, the reversion of and in the same with the appurtenances then belonging to the plaintiff, and the other thereof in the possession and occupation of as tenant thereof to the plaintiff, the reversion of and in the same with the appurtenances then belonging to the plaintiff; that the defendant was then possessed of a certain close near to the said cottages, and of certain buildings of wood and thatch, also near to the said cottages; and that the defendant was then also possessed of a certain rick or stack of hay before then heaped, stacked, or put together, and then standing and being in and upon the said close of the defendant.

That on the day of 19.., while the said cottages so were in the occupation of the said tenants, and while the reversion thereof respectively so belonged to the plaintiff as aforesaid, the said rick or stack of hay of the defendant was liable and likely to ignite, take fire, and break out into a

¹⁵ Smith v. Fabey, 63 W. Va. 346 (1908).

flame, and there had appeared and were just grounds to apprehend and believe that the same would ignite, take fire, and break out into flame; and by reason of such liability, and of the state and condition of the said rick or stack of hay, the same then was and continued to be dangerous to the said cottages; of which said several premises the defendant then had notice: yet, the defendant well knowing the premises, but not regarding his duty in that behalf, on, etc., and from thence until and upon a certain day, to wit, on, &c., wrongfully, negligently, and improperly, kept and continued the said rick or stack of hay, so likely and liable to ignite and take fire, and in a state and condition which was dangerous to the said cottages, although he could, and might, and ought to have removed and altered the same, so as to prevent the same from being and continuing to be so dangerous as aforesaid; and by reason thereof the said cottages for a long time, to wit, during all the time aforesaid, were in great danger of being consumed by fire.

That by reason of the premises, and of the carelessness, negligence and improper conduct of the defendant, in so keeping and continuing the said rick or stack, in a state or condition to be so dangerous as aforesaid, and so liable and likely to ignite and to take fire and to break out into flame, on, &c., and while said cottages so were occupied as aforesaid, and the reversion thereof respectively belonging to the plaintiff, the said rick or stack of hay of the defendant, standing in the close of the defendant, and near the said cottages, did ignite, take fire, and break out into flame, and by fire and flame thence issuing and arising, the said buildings of the defendant so being of wood and thatch as aforesaid, and so being near to the said rick or stack as aforesaid, were set on fire; and thereby and by reason of the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick or stack in such condition as aforesaid, fire and flame so occasioned as aforesaid by the igniting and breaking out into flame, of the said rick or stack, was thereupon communicated unto the said cottages in which the plaintiff was interested as aforesaid, which were thereby then respectively set on fire, and then, to wit, on, &c., by reason of such carelessness, negligence, and improper conduct of the defendant in so continuing the said rick or stack in such dangerous condition as aforesaid, in manner aforesaid, were consumed, damaged, and wholly destroyed, the cottages being of great value, to wit, the value of dollars.

And by means of the premises, the plaintiff was greatly and permanently injured in his said reversionary estate and interest of and in each of them; to the plaintiff's damage of dollars.

2051 Business, destruction, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., and on divers other days and times between that date and the commencement of this suit, at, in the county aforesaid, the defendant, with force and arms, seized, took, broke, scratched, dented, mutilated, carried away and destroyed the following goods and chattels of the plaintiff.., to wit: (Describe goods) and other articles of jewelry, leather goods and fancy goods of the value of dollars.

2. And for that, also, heretofore, to wit, on the day of, 19.., and on divers other days and times between that day and the commencement of this suit at the city and county aforesaid, while the plaintiff.. w... in the lawful and peaceable possession of a certain lot of land known as (Describe land) in said city of, together with part of the main or first story of a building thereon, and w... carrying on the business of dealing in (Describe business) in said part of said building on said lot of land, the defendant.., with force and arms broke and entered the said lot of land and the said part of the said first or main story of said building thereon of the plaintiff.., and with force and arms seized, took, broke, scratched, dented, mutilated, destroyed and carried away divers other goods and chattels of the plaintiff.., to wit: (Describe goods) and other articles of jewelry, leather goods and fancy goods of the value of dollars, then found and being in said part of said building, at, to wit, the county aforesaid.

3. And for that, also, the defendant.., heretofore, to wit, on the day of, 19.., and on divers other days and times between that day and the commencement of this suit, with force and arms broke and entered into a certain other close of the plaintiff.., situated in the county aforesaid consisting of a lot of land and part of the first or main story of a building thereon, occupied by the plaintiff.. as a store for the sale of jewelry, fans, leather goods and notions, and then and there expelled and amoved the plaintiff.. and ..h.. agents and employees from the possession, use and occupation of the last mentioned lot of land and the said part of said first or main story of the said building thereon, and kept and continued ..h.. so expelled and amoved for a long space of time, to wit, from thence hitherto.

By means of which said several premises the plaintiff ..w..., during all the time aforesaid disturbed in and deprived of the possession of said lot of land and the said part of the said first or main story of said building thereon and lost and w.... deprived of the use and benefit of ..h.. said last mentioned lot of land and said part of said building thereon, and also by

means thereof the business of the plaintiff.. which ..he.. w.. carrying on upon the said premises, and which was of the value of dollars, was wholly ruined and destroyed and the plaintiff.. w.. thereby deprived of ..h.. means of support and wholly lost ..h.. earnings and gains which ..h.. would otherwise have made in ..h.. said business; and the defendant.. other wrongs to the plaintiff.. then and there did against the peace of the people of this state, and to the great damage of the plaintiff... Wherefore, the plaintiff.. say.. that ..he.. injured and ha.. sustained damage to the amount of dollars, and therefore ..he.. bring.. ..h.. suit, etc.

b

For that whereas, heretofore, on, to wit, the day of, 19.., and for a long time prior thereto, at the county of, and the state of Illinois, the plaintiff was engaged in the business of the manufacture and sale of paints, putty, painters' supplies, and had then and there in its service, and under contracts for salary and wages, a large number of employees, salesmen, officers, and laborers, and its business aforesaid was then and there extensive and profitable, and then and there it had in use in its said business, a large amount of heavy machinery difficult to move, consisting of mills, mixing tanks, chasers and other machinery, and also a large amount of belting, and then and there had in daily use in said business sufficient shafting, steam power and water power to operate said mills, mixing tanks, chasers, machines, belting and machinery, and had then and there on storage convenient to its said business, a large amount of material for use in its said business, and had then and there on hand, a large amount of manufactured paint, putty and painters' supplies, packed and ready to be packed for shipment and delivery, in its business aforesaid, and then and there had the use of an elevator to carry its laborers and supplies between the lower and upper stories of the building then and there occupied by the plaintiff in its business aforesaid, and was then and there regularly engaged in its peaceful and lawful business aforesaid.

And being so engaged as aforesaid, and having completed on that day the work of the week as was its custom, it closed its house of business on evening, with the expectation and intention of resuming its ordinary business on, then next following.

But that said defendant, at the county and state aforesaid, on the day of, 19.., without notice to the plaintiff, suddenly, unlawfully, willfully, maliciously and violently, by force and arms, accompanied by a great multitude of men, came into and upon the building where said mills, mixers, mixing tanks, machines, chasers, machinery belting, materials

and supplies and manufactured products were then and there situated, and where said business was conducted as aforesaid, and then and there the said defendants, riotously, unlawfully, violently, by force and arms willfully and maliciously, broke in the doors and windows and bore off the roof of said building, and rendered the same untenable and wholly unfit for said business, and for days thereafter, and until enjoined therefrom by order of this honorable court, continued in their work of demolition of said building and destruction of the personal property therein situate, and then and there cut and destroyed the belting connecting said shafting with said mixers, mixing tanks, chasers, mills, machines and machinery and broke and destroyed the couplings which connected said shafting, and broke and severed the water pipes and steam pipes in said building, and flooded the floors of said building with water and filled the rooms of said building with steam and rendered said elevator useless for its intended purposes, and broke and destroyed barrels of of the property of plaintiff, of the value of dollars, and rendered wet and unfit for use the said materials in storage as aforesaid of the property of the plaintiff of the value of dollars, and then and there compelled the plaintiff to suspend its business aforesaid, and caused plaintiff to lose the profits thereof for a long time thereafter, to wit, for the space of months then next ensuing, and prevented plaintiff from filling its contracts for the delivery of the paints, putty and painters' supplies to its patrons, and greatly damaged, soiled and injured plaintiff's paints, putty and painters' supplies then and there on hand, and then and there secretly and without the knowledge of the plaintiff, damaged and injured a large amount of its material thereafter used in the manufacture of putty, to such an extent that many car-loads of its putty shipped by plaintiff to its customers, were, by its customers returned to the plaintiff as rejected and unfit for use, thereby causing large losses to plaintiff in the payment of railroad freight charges, in profits on its sales, in loss of business, in cost and expense of manufacture, and cost and expense of handling, and in loss of materials used in the manufacture of said putty; and also caused plaintiff to suffer great injury and damage in its business, and in its credit and reputation among business men for a long time thereafter, to wit, from thence hitherto, and to lose a large sum of money for the payment of salaries and wages to its officers, servants, employees and laborers then and there in the service of the plaintiff under contracts requiring the plaintiff to pay sums certain for their time, service and expenses; and then and there by the means aforesaid caused the credit and the business of the plaintiff to be wrecked and ruined, and the said defendants many other wrongs and injuries to and upon the plaintiff then and there as aforesaid, by force and arms violently, unlaw-

fully, maliciously and willfully, did and caused to be done against the peace of the people of the state of Illinois, and to the damage, etc.

2052 Cattle, injury, action

At common law the owner of cattle is bound to keep them on his own land and must respond in damages for their trespasses; and no one is required to fence his own property against cattle which run at large.¹⁶ This is the rule in Illinois by virtue of statute, or local law.¹⁷

2053 De bonis asportatis, Narr.

For that whereas the defendants, on, etc., with force and arms in the county aforesaid seized, took and carried away the goods and chattels, to wit, a certain stock of goods, consisting of a full line of (Describe same), also all store fixtures, all of said goods, chattels and effects being in the store building of the plaintiff and in and about the premises, connected therewith, and in a certain one story frame building on the right of way of the, in said of, and used by the plaintiff in the business then being conducted by the plaintiff on lot (Describe same), situated in, in the county of and state of, all of the aforesaid property being the property of the plaintiff and of the value of dollars, and converted and disposed of the same to their own use; and other wrongs to the plaintiff then and there did, against the peace of the people of the state of, to the damage, etc.

2054 Depasturing farm, Narr. (Md.)

For that said defendants broke and entered certain land of the plaintiff, lying and being situate in county, Maryland, being that part of certain tracts of land, conveyed to the plaintiff by and wife by deed dated, 19.., and recorded among the land records of said county, in liber No., folio, containing.... acres more or less, which lies and is situate in said county, adjoining the land of which (the father

¹⁶ Bulpit v. Matthews, 145 Ill. 345, 349 (1893); McCormick v. Tate, 20 Ill. 334, 338 (1858); Seeley v. Peters, 5 Gilm. 130 (1848), overruled.

¹⁷ Secs. 1, 5, c. 8, Hurd's Stat. 1909, p. 158.

of all the defendants except, who is his widow) died seized, and which was conveyed to him by by deed recorded among the said land records in liber, No. ..., folio ..., and depastured the same with cattle, and ploughed up and dug into the same, and cut wood and trees, and other injuries to the same did, to the great damage and injury thereof.

And the plaintiff claims dollars damages.

b

For that the defendant broke and entered certain land of the plaintiff, lying and being situate in the election district of county, adjoining the lands of and the lands formerly belonging to, and depastured the same with cattle, and other wrongs and injury to said land then and there did.

And plaintiff claims \$.

2055 Drainage district, construction, dedication

An implied dedication of a reasonable amount of land for drainage purposes arising from the voluntary action of several interested land owners, will not be extended beyond the limits of the dedication against each land owner's consent; and this dedication does not include the right to take or damage additional lands that are adjacent to the lands which are thus dedicated without compensation.¹⁸

2056 Drainage district, construction, Narr. (Ill.)

For that whereas, the plaintiff, on, to wit,, 19.., was the owner and in the actual possession of the following described real estate, to wit: (Insert description) in the county of and state of Illinois; that theretofore the plaintiff and the parties owning the land adjoining to the land of the plaintiff above described, did by voluntary action construct a line of ditch across the lands above described and the lands adjoining thereto on the west and south; that said adjoining land then and there required a system of combined drainage; that afterwards, on, to wit,, 19.., said line of ditch needed repairs and improvements, and the same was not made by voluntary agreement; that certain persons owning parts of said line of ditch did petition for the formation of a drainage district to include the land above described,

¹⁸ Price v. Union Drainage District, 253 Ill 114, 116 (1912); Sec. 76, Farm Drainage act.

and other land, interested in maintaining said line of ditch; that thereupon certain proceedings were had, whereby the defendant corporation was organized as provided by section 76 of an act of the state of Illinois to provide for drainage for agricultural and sanitary purposes, and to repeal certain acts therein named, approved June 27, 1885, and in force July 1, 1885, and the amendments thereto.

And the plaintiff further avers that at the time of the organization of the defendant corporation and up to the time of committing the grievance hereinafter mentioned, the said ditch across the lands of the plaintiff above described was of the width of, to wit, from feet, and of the depth of, to wit, feet and no further or greater tract of land had ever been dedicated to or for the use of said ditch or occupied for the use of the same up to that time; that afterwards, on, to wit, 19.., the defendant, with force and arms, etc., in the county aforesaid, in the repair and improvement of said line of ditch across the land of the plaintiff above described, broke and entered a certain tract of land then and there owned by, and in the actual possession of the plaintiff, by then and there entering in and upon said line of ditch on the land of the plaintiff as above described, and then and there excavating, widening and deepening the same, so that said ditch was of the width of, to wit, feet and of the depth of, to wit, feet; and the defendant then and there in the making of said excavations, did throw dirt on each side of said ditch covering a space of, to wit, feet, on each side of the line of said ditch; and then and there from said time hitherto, did convert and has converted to its own use, a tract of land then and there belonging to the plaintiff, which was not theretofore used for said ditch, of the width of, to wit, feet and of the length of, to wit, rods, and of the value of dollars; and other wrongs the defendant to the plaintiff then and there did, to the great damage of the plaintiff, and against the peace of the people of this state.

And the plaintiff further avers that the defendant before the committing of the trespass above mentioned, did not condemn as provided by law, any part of said land so taken for an additional right of way, and did not, and has not paid the plaintiff for said land, and the plaintiff has not released its damages to the defendant on account of said trespass.

Wherefore, etc.

2057 Ejection from railroad train, action

A railroad ticket which, upon its face, limits its use to a certain day, cannot be used after that day, even with the consent of the ticket agent at the place where a train is boarded, as a ticket agent has no implied authority to waive the limitation;

and a conductor, without using force, may lawfully eject a person who presents such a ticket on the train and who refuses to pay proper fare.¹⁹

2058 Ejection from street car, Narr. (Ill.)

For that whereas the said defendant, before and at the time of the committing of the grievances hereinafter mentioned, was a corporation, and was possessed of and operating a certain street railroad, in, upon and along certain public streets, commonly known respectively as, to wit, avenue and street, in the city, county of, and state of Illinois, and was possessed of and operating certain cars, and was a common carrier of passengers by means of said cars, which were run or propelled on and over said street railroad, for hire and reward by said defendant, in that behalf, to wit, at the city of aforesaid; that said street then and there intersected said avenue; and it then and there became and was customary and necessary for passengers who were carried by the defendant, in the cars of the defendant, upon and over the street railroad of the defendant, in, upon and along said avenue, who desired to be carried in the cars of the defendant upon and over the street railroad of the defendant in, upon and along said street, to change cars or transfer from said avenue cars to said cars of the defendant.

Plaintiff further avers that in and by an ordinance duly ordained and enacted by the city council of the said city of, on or about the day of, 19.., it is provided, among other things, as follows, to wit: (Insert franchise ordinance).

That said ordinance was duly accepted by said railway company, in said ordinance mentioned, in manner and form as provided for such acceptance in and by said ordinance; that the street railway of the defendant, in, along and upon said avenue, was constructed and was operated by the railway company prior to the enactment of said ordinance, and at the time of the committing of the grievances herein mentioned, intersected, and came within feet of the street railroad of the defendant in, along and upon said street; that the defendant is the successor of said railway company, in and to the rights and franchises conferred by said ordinance, and that the street railroad of the defendant on said avenue and street is used and operated subject to the provisions and conditions of said ordinance.

That in and by a certain other ordinance duly ordained and

¹⁹ Pennington v. Illinois Central R. Co., 252 Ill. 584 (1912).

enacted by the city council of the city of....., it is provided as follows, to wit: (Insert rate of fare, etc., ordinance).

Plaintiff further avers that it was then and there the duty of the defendant to issue to a passenger being carried in one of its said avenue cars, who desired to change or transfer from said avenue car to one of the street cars of the defendant, at said intersection, and who paid the regular and lawful fare and reward of five cents to the conductor on said avenue car, a certain ticket, commonly known as, to wit, a transfer, or transfer ticket, in and by which said transfer or transfer ticket, said passenger was entitled to be carried in the cars of the defendant upon and over the street railroad of the defendant, in, upon and along said street, without the payment of any other or additional fare or reward whatever.

And the said defendant being a common carrier, as aforesaid, thereupon, heretofore, to wit, on the day of, 19.., at the city of aforesaid, the plaintiff, at the special instance and request of said defendant, became and was a passenger in a certain car of the defendant, which was then and there being propelled in a northwesterly direction on said avenue, to be safely and securely carried and conveyed, in and by said car, on a certain journey, to wit, to the said intersection of avenue and street, and then in and by another car of the defendant, in a northerly direction, upon and over the street railroad of the defendant, in, upon and along said street. That upon becoming a passenger on said avenue car as aforesaid, the plaintiff then and there paid to the conductor of said avenue car, who was a servant of the defendant, the regular fare and reward of five cents, which fare and reward was received by said conductor; that at the time and place aforesaid, the said plaintiff requested the said conductor to issue or give to plaintiff one of the transfers or transfer tickets aforesaid, to enable the plaintiff to be carried in a northerly direction over the street railroad of the defendant, in, upon and along said street, from the said intersection of avenue and street, and then and there the said conductor issued or gave to the plaintiff one of said transfers or transfer tickets; that upon arriving at the intersection of said avenue car, in which he had been theretofore carried on said avenue, and then and there, within one hour after said transfer or transfer ticket was given or issued to the plaintiff as aforesaid, entered into and became a passenger in a certain car of the defendant, which was then and there used and operated by the said defendant for the carrying of passengers in a northerly direction from said intersection of avenue and street, upon and over its said street railroad, in, upon and along said street, and then and there

the conductor of said car, being one of the servants of the defendant, came to the plaintiff and demanded of the plaintiff a fare or reward for the carriage of said plaintiff in said street car; that then and there the plaintiff tendered and offered to surrender and pay to the said conductor of said street car, the identical transfer or transfer ticket issued or given to the plaintiff, as aforesaid, by the said conductor of the defendant on said avenue car, which said transfer ticket the said conductor of said street car refused to accept in payment of the fare or reward for the carriage of the said plaintiff in said street car, and then and there demanded that the plaintiff pay to the defendant a fare or reward in money; that the plaintiff then and there explained to said conductor the circumstances under which he received the transfer or transfer ticket from the conductor of the defendant on said avenue car, and remonstrated with said conductor of said street car against the requirement or demand of a fare or reward in money; that thereupon the said conductor with force and arms assaulted the plaintiff and then and there wilfully, wantonly and maliciously, and with excessive and unreasonable force and violence, seized, grasped and laid hold of the plaintiff, and wilfully, wantonly and maliciously, and with great, unnecessary and unreasonable force and violence, pulled, thrust, shoved and dragged the plaintiff through and out of the defendant's car, which was then and there filled with divers people and strangers to the plaintiff, and did then and there, in the presence of many people, wilfully, maliciously and wantonly, with great, unnecessary and excessive force and violence, expel, thrust and eject the plaintiff from the said car, and thereby did throw him and cause him to be thrown with great force and violence down to and upon the ground.

By means whereof, the head, body and limbs of the plaintiff were seriously injured, and the bones thereof became and were fractured and broken, and the said plaintiff was otherwise greatly bruised, wounded and injured; and also by means of the premises, the said plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, and will remain and continue permanently in the future; during all of which time, to wit, from thence hitherto, the plaintiff suffered and underwent great pain, and the said plaintiff's life was despaired of, and still is despaired of, and the said plaintiff was hindered and prevented from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages and charges which he might and otherwise would have derived and acquired, and especially said plaintiff was hindered and pre-

vented from transacting, pursuing and carrying on his business as a jeweler, during all that time to be transacted, pursued, and carried on, from which employment and business said plaintiff then and there derived a large income and great profits, to wit, an income and profit of a year, and was permanently disabled from carrying on his employment and business as a jeweler aforesaid, and deprived of divers great gains, profits, income, wages, salary, commissions and charges which he might and otherwise would have derived from said employment and business; and thereby also the said plaintiff was permanently disabled from at any time thereafter resuming his said employment or business as a jeweler, or from receiving the gains and profits, income, salary, commissions and reward thereof, which he might and otherwise would receive, and also from engaging in or pursuing any other business or employment, and from receiving the gains, profits, and rewards thereof, which he might and otherwise would receive, and thereby the said plaintiff was forced and obliged to and did then and there pay, lay out and expend divers large sums of money, amounting in the whole to dollars, and became liable to pay, lay out and expend divers other large sums of money, amounting in the whole to dollars, in and about endeavoring to be cured of the said fractures, bruises, wounds and injuries so received, as aforesaid, to the damage, etc.

2059 Eviction, plaintiff, Narr. (III.)

For that whereas, on, to wit, the day of, 19.., and at other times between that date and the beginning of this suit, the defendants with force and arms broke and entered a certain close of plaintiff upon which was a dwelling-house of plaintiff, then and there in her possession, to wit, in the county aforesaid, and with force and arms evicted the plaintiff from said dwelling-house and amoved plaintiff's tenants therefrom and annoyed and harassed the plaintiff and her tenants in the occupancy of said premises, and thereafter, after evicting the plaintiff, annoyed and harassed the plaintiff, refusing plaintiff access to her clothing and goods which were held by the defendants, to wit, within the close of the plaintiff aforesaid; whereby plaintiff by means of which several premises became ill and sick and so remained for a long space of time, to wit, from said date hitherto, during all which time the plaintiff suffered great illness and was hindered and prevented from transacting her affairs and business thereby, and also whereby the plaintiff was obliged to, and did necessarily lay out divers sums of money in consequence of said illness so by the defendants occasioned as aforesaid, to the damage, etc.

2060 Eviction, tenants, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19..., and on divers other days and times between that day and the commencement of this suit, the defendants with force and arms broke and entered a certain close and premises in, to wit, the county aforesaid, containing a dwelling-house belonging to the plaintiff then and there in her possession, in the absence of the plaintiff at her daily labor, and then and there threatened to amove and put out the plaintiff's tenants in possession of part of said dwelling-house from the use and occupancy and enjoyment of said dwelling-house, and did amove and put out said tenants and thereafter kept plaintiff's tenants out of possession thereof; and said defendants on said day of, 19..., made a pretended sale of said close of plaintiff then and there in her possession to a person, to wit, one of said defendants, and put said pretended purchaser into possession of said close, to wit, in the county aforesaid, while said plaintiff was absent therefrom at her daily work, and continued said pretended purchaser in possession and aided and abetted said pretended purchaser in holding possession of said close and premises against said plaintiff for a long time, to wit, from thence hitherto; whereby plaintiff was during all that time deprived of the rents of said premises and the occupation and enjoyment of the same, and was prevented from giving possession of said premises to other tenants who stood ready to rent the same, and was put to great annoyance and expense in and about regaining possession of the same, and was hindered and prevented from carrying on and transacting her business, and was made ill for a long space of time, to wit, from said date hitherto; and other wrongs to plaintiff then and there did, against the peace of the people of this state, to the damage, etc.

2061 Excavation generally, Narr. (Md.)

For that the defendant broke into and entered the plaintiff's close in county aforesaid, situated in the town of, in said county, said close beginning (Give legal description), it being the same property leased to the plaintiff by the defendant, and being part of the property described in a deed to the defendant from dated and recorded in liber, folio, of the land records of county, and the defendant with force and arms did great damage thereon, excavated the ground appurtenant, destroyed the access of the plaintiff to said alley, broke open the cellar door of the plaintiff, interfered with and damaged the trade, business and occupation of the plaintiff, and other damage and injury to plaintiff's said close then and there did, to the great loss and damage of the plain-

tiff; wherefore, the plaintiff brings this suit and claims dollars damages.

2062 Excavation, water tunnel, Narr. (Ill.)

For that whereas, heretofore, before and at the time of the committing of the grievances hereinafter mentioned the said plaintiffs were, and from thence hitherto have been, and still are, the owners of and lawfully possessed of the following described real estate situated in the city of, county of, and state of Illinois, to wit: (Insert description), being feet on the north side of street in the said city of by feet deep to an alley in the rear, improved by a story brick building known as number street, which said premises were at the times aforesaid owned and possessed by the said and the said trustees of the estate of, deceased, as tenants in common; that thereupon, the said defendant, a municipal corporation, organized and existing under the laws of the state of Illinois, on, to wit, the day of, 19.., at, to wit, the county aforesaid entered upon and commenced the construction of a water tunnel as part of the water works system of the said city of for the purpose of conveying water from the waters of lake for the use of the inhabitants of said city of, under and by virtue of the power and authority vested in said city of by the statute of the state of Illinois in such case made and provided; that said water tunnel was constructed by said defendant at the times aforesaid, from or near the shores of lake on the east of the plaintiffs' premises at a point west of the premises aforesaid owned by said plaintiffs; that said tunnel was dug by the said defendant or its agents, many feet below the surface of the ground and underneath the premises aforesaid owned by the plaintiffs; that the construction of said tunnel was commenced on or about the day of, 19.., and said construction was continued from time to time up to the time of the commencement of this suit.

And the plaintiffs aver that it then and there became and was the duty of said defendant in digging and constructing the said tunnel to so dig and construct the same that no damage should result to the premises of the plaintiffs, owned by them as aforesaid; but the defendant, not regarding its duty in the premises, in digging and constructing the said tunnel; carelessly and negligently used a larger quantity of high explosives or dynamite for the purpose of blasting ground and rock in said tunnel than was reasonably and properly necessary for the purpose of properly constructing the said tunnel, which said explosives were exploded in the said tunnel by the said defendant or its agents in unnecessarily large quantities as afore-

said, underneath or near the premises owned by the plaintiffs aforesaid, on to wit, day of, 19..., and many times subsequent thereto up to the date of the commencement of this suit.

By reason of the explosion of said dynamite the ground under the building aforesaid of said plaintiffs was jarred and shaken, and by reason of said jarring and shaking the walls of said building of the plaintiffs' were cracked and otherwise damaged and the plastering of said building was broken and the wall paper and paint therein were damaged and destroyed and the casements around the windows and doors of the said building were broken and cracked and the windows in the said building were broken and the doors thereof were warped and cracked; and the walls of the said building settled and said building was otherwise badly damaged and put out of repair; and by reason of the acts of the defendant above set forth the tenants of the plaintiffs occupying the said building have abandoned the same and the plaintiffs have lost large sums of money in the rental of said premises, to wit, the sum of dollars. And the said defendant has remained in the use and occupation of that part of the plaintiffs said premises occupied by the said tunnel, and the plaintiffs have been deprived of the use and occupation thereof; and also by reason of the acts of the defendant, as above set forth, the plaintiffs have been forced and obliged to pay out a large sum of money, to wit, the sum of dollars in rebuilding and repairing the said premises, at, to wit, county aforesaid. And other wrongs to the said plaintiffs the said defendant then and there did, to the great damage of the said plaintiffs and against the peace of the people of the state of Illinois.

Wherefore, the said plaintiffs say that they are injured and have sustained damages to the amount of dollars, and therefore, they bring their suit, etc.

2063 Fishing, Narr. (Mich.)

For that whereas, on the day of, 19..., and on divers other days and times between that day and the day of the commencement of this suit, with force and arms said defendant broke and entered a certain close of the plaintiff, known and described as (Give legal description) being situated in the township of, in said county of and on which close there is situated a valuable fishery, at which large quantities of (Describe kind of fish) and other fish are annually caught, to wit, at the in the county of; and then and there, with force and arms, drove, ejected and expelled the servants and agents of the plaintiff who were there for the purpose of fishing at the said fishery, from said close of the plaintiff, and from the fishery and the waters thereof; and then and there caught large quantities of

fish therefrom and converted the same to their own use, to wit, (State quantity of fish) of great value, to wit, of the value of dollars; and then and there prevented the plaintiff and his servants from catching any fish at said fishery; whereby a large quantity of fish, to wit, (State quantity), of great value, to wit, of the value of dollars became wholly lost to the plaintiff, to wit, at aforesaid.

2064 Hedges, destruction, Narr. (D. C.)

For that on, to wit, the day of, he was the owner in fee simple of the land and premises known as and being lot (Describe same) in the District of Columbia, as the same appears of record in book, county number at page, in the surveyor's office of the District of Columbia; that on said date he was seized and possessed of said land and premises and for a long time prior thereto had been and ever since has been and now is seized and possessed of said land and premises; that, on, to wit day of, there was standing alive and growing thereon a valuable hedge of vines, bushes, shrubs, saplings and trees; that, on, to wit, the day of and on divers other days and times between that day and the time of the commencement of this action, the said defendant herein, with force and arms wrongfully and unlawfully came upon and entered said land and premises and did then and there wrongfully, and unlawfully and maliciously fell, cut down and destroy said vines, bushes and shrubs, saplings and trees of the number of, to wit, of said vines, bushes, saplings, shrubs, and trees making, constituting and being the plaintiff's said hedge in and upon said land there situate, and then and there growing and being, and took and carried away the same, of the great value, to wit, of the value of dollars, and did tear down and remove the fence then and there situate on the lands and premises of the plaintiff herein and belonging to him and took and carried away the same of the value of, to wit, the value of dollars, and did also dig holes in said lands and premises and set posts therein, and make, build, and place therein a fence at and near the place where the said hedge had been growing and was so destroyed as aforesaid by the defendant, to the damage, etc.

2065 Lumber, removal, Narr. (W. Va.)

For this, to wit, that heretofore, to wit, on the day of, 19.., the plaintiffs were the owners of, and in actual possession of a lot of lumber, to wit, about feet of the value of, and on the waters of creek in said county, and the said plaintiffs then and there being in actual possession of said lumber and in the process of brand-

ing and inspecting the same, said defendants then and there and with force and arms and without the consent and against the protest of the plaintiffs, seized and took out of the actual possession of the said plaintiffs, their said lumber, and they, the defendants did then and there with force and arms, and without the consent and against the protest of the plaintiffs take and carry away the said lumber of the said plaintiffs as aforesaid, and then and there converted the same to their own use; and thereby plaintiffs' said lumber was wholly lost to them and plaintiffs thereby suffered great injury and were greatly damaged, to wit, to the amount of; and therefore they bring this suit.

2066 Pollution of stream, Narr. (Va.)

For this, to wit, that whereas the said plaintiffs, before and at the time of committing the grievances hereinafter mentioned, and from thence thereto, were possessed of, owned and occupied, a certain farm or tract of land in the county of, state of Virginia, near, in said county, containing acres, through which the waters of creek, a non-navigable stream, flow on their way to the river, upon which farm the father of the plaintiffs resided with his family for over years until his death, which took place some years ago, at which time said land descended to the plaintiffs as his heirs at law and who have had charge and management of said farm since, cultivating and renting the same out for farming purposes, especially the low grounds or flat land on either side of said creek which flows as aforesaid through said farm, which said low grounds or flat land was, until, the grievances hereinafter complained of, very valuable and productive, producing fine crops in the usual course of farming, and splendid grazing for cattle, with a good supply of timber on either side of said creek, valuable not only as timber but for shade for stock; by reason of all of which and the healthfulness of said farm and the fishing in said creek, their said farm was of great value in the estimation of the public, and was on that account worth a large sum of money, to wit, dollars. And through the plaintiffs' said farm there was running the aforesaid creek of pure water irrigating plaintiffs' said farm and supplying healthful drinking water for stock, pasturing along said creek within plaintiffs' farm aforesaid and drinking daily from said stream, and said stream being stocked with numerous kinds of fish, and the water of said creek being good and wholesome for all purposes; that the said V company some years ago purchased a tract of some acres of land in county, Virginia, not much more than a mile above the land of the plaintiffs above described, through which the said creek flows on its way down to the land

of the said plaintiffs, which said tract of land has during the time mentioned been in the possession and operated by R company, defendant; that the said U company also purchased some years ago a tract of some acres of land incounty, Virginia, immediately above and adjoining the above tract belonging to the V company through which the said creek flows on its way down to the land of the said plaintiffs; and that the A company purchased or leased some years ago a tract of some acres of land in, county, Virginia, immediately above and adjoining the last named tract belonging to the U company through which the said creek flows on its way down to the land of the said plaintiffs, so that the water which passed along said creek through the plaintiffs' land, came through the lands of all of the said defendants before reaching the land of the said plaintiffs.

And the said defendants, the V company, the R company, the U company, and the A company have erected upon their several tracts of land aforesaid large mining and concentrating plants and have sunk shafts down hundreds of feet and have been and are continuing to pump therefrom large quantities of water which is impregnated with iron, sulphur and copper, a large part of which is sulphur, which water is further largely impregnated with sulphur and iron and copper and other minerals by being used for washing the ore taken from said shafts or mines, which is commonly called "iron pyrites," and said water in this polluted and unhealthy state is allowed by said defendants to flow into said creek, carrying with it large and constantly increasing quantities of refuse ore; and further, said owners of said mining plants have on their said lands erected large reservoirs into which they are pumping and are continuing to pump water from said creek and using the same by washing said "iron pyrites" ore, thus impregnating and polluting said water and continuing more and more to impregnate and pollute said water with iron, sulphur and copper, and other minerals, and allowing and continuing to allow said polluted water to flow by said defendants into said creek carrying with it great quantities of refuse ore, and continuing to allow the water so impregnated and polluted, without the consent of said plaintiffs, but against their protest, to flow along the natural bed of said creek into and through the lands of the said plaintiffs bringing with it large quantities of refuse ore which has been and is continuing to be deposited on the banks of said stream, and in said bed of said creek, on the lands of the plaintiffs, and depositing large quantities of said refuse ore in said bed of said stream on plaintiffs' land and on the banks of said stream on plaintiffs' land and on other of said lands of the plaintiffs.

By reason whereof the contaminated water flowing in its natural channel through the plaintiffs' land (depositing

refuse ore as aforesaid) during freshets has been and is continuing to wash large quantities of said refuse ore of said bed of said stream and to spread the said refuse ore on the lands of the plaintiffs in other places than on the banks and in the bed of said stream, and also to bring down said stream further and additional quantities of said refuse ore and to deposit the same in said bed of said stream and on said banks of said stream, and also on said other lands of the plaintiffs, so that large quantities of said refuse ore have been and are continuing to be deposited in said bed of said stream on plaintiffs' land and on said banks of said stream on plaintiffs' land and also on other of said lands of the plaintiffs, and the quantity of said deposits of said refuse ore in said bed of said stream and on said banks of said stream and on said other lands (all on plaintiffs' land) being constantly increasing and said refuse ore, deposited as aforesaid, and said polluted water, have greatly injured and are continuing to injure the land of said plaintiffs for farming purposes, and have killed large quantities of timber and vegetation upon said land, and are continuing to kill further and additional quantities of timber and vegetation on said land, and have been injurious to stock on said land, and are continuing to be injurious to stock on said land; and said polluted water has been and is becoming more and more injurious to stock of all kinds on said land; and is gradually injuring and destroying fish in said creek; and said deposits of refuse ore and said polluted water have to some extent become injurious to the healthfulness of said land, and are continuing and are gradually becoming more and more injurious to the healthfulness of plaintiffs' land, as well as its usefulness; and the said impregnated and polluted water in said creek, and the deposits aforesaid of refuse ore in and upon the plaintiffs' said land, came to be and have continued to the commencement of this suit, said water being impregnated and polluted and unfit for use and unhealthy; and said polluted water and said refuse deposits of ore damaging timber, vegetation, crops, fish and everything else with which it comes in contact; and said deposits of refuse ore in said bed of said stream and on said banks thereof, and on said lands damaging and injuring and continuing to damage and injure the said farm of said plaintiffs; and the plaintiffs have suffered and are continuing to suffer great damage by reason of the aforesaid injuries of their said farm; and by reason of the wrongful acts aforesaid the plaintiffs have been deprived of the profit and beneficial use of their said land and said stream.

And, therefore, the plaintiffs say that by reason of the grievances hereinbefore complained of they have up to the time of this suit sustained damage from the wrongful acts of the said defendants to the extent of dollars, and hence they bring this suit; which said damages are hereby claimed

for said injuries prior to the institution of this suit, but are not intended to cover the damages sustained by the plaintiffs from injuries inflicted subsequent to the institution of this suit, the said injuries being of a continuing character and the plaintiffs reserving the right to bring future suit both at law and in equity.

2067 Quare clausum fregit, Narr.

For that whereas, on and prior to the day of, 19.., etc., the defendants broke and entered a certain store building of the plaintiff, situated in the county aforesaid, more particularly described as the, situated on lot (Insert legal description) in the of, and then and there expelled and amoved the plaintiff from the possession, use, occupation and enjoyment of the same, and kept and continued him so expelled and amoved for a long space of time, to wit, from thence hitherto, whereby the plaintiff during all of that time lost and was deprived of the use and benefit of the said store building; wherefore, the plaintiff says that he is injured, to the damage, etc.

b

For that whereas, on, to wit, the day of, 19.., and on divers other days between that day and the commencement of this suit, with force and arms, etc., the defendant broke and entered a certain close of the plaintiff, described as follows, to wit, (Insert description), situated in the county aforesaid, and then and there broke down, removed, destroyed and injured divers fence posts and fences of the plaintiff of the value of, to wit, dollars, then standing and being in the said close, and with feet in walking trod down and spoiled the grass, corn and other corps of the plaintiff of the value of, to wit, dollars, then and there growing and being, and tore up, damaged and spoiled the earth and soil of the said close, and greatly incumbered the said close and hindered and prevented the plaintiff from having the use, benefit and enjoyment thereof in so large and ample a manner as he might and otherwise would have done; and other wrongs the defendant to the plaintiff then and there did, to the great damage of the plaintiff and against the peace of the people of this state.

Wherefore, etc.

c

For that whereas, on, to wit, the day of, 19.., and on divers other days and times between that day and the commencement of this suit, with force and arms the defendant broke and entered a certain close of the plaintiff, situate in

..... county, Illinois, and described as follows, to wit (Give description); and then and there forced and broke down the fence of said plaintiff, then upon said premises, and broke to pieces, damaged and spoiled the said fence of said plaintiff of the value of, to wit, dollars, then standing upon and being in said close; and also during the time aforesaid, to wit, between the day of, and the commencement of this suit, the said defendant with force and arms, etc., put, placed and laid and caused and procured to be put, placed and laid, divers large quantities of dirt, gravel, etc., upon said premises, and kept and continued the said dirt and gravel, so there put, placed and laid, without the leave or license, and against the will of said plaintiff, for a long time, to wit, from the respective time of putting, placing and laying the same as aforesaid, until the commencement of this suit, and thereby and therewith, for and during those respective times, greatly incumbered said close and hindered and prevented the plaintiff from having the use, benefit and enjoyment thereof, and thereby damaged said close to the amount of, to wit, dollars. Wherefore, etc.

2068 Railroad construction and operation, action

A railroad company is liable for negligent construction of its road and the negligent operation of its trains, although the injury occurs from the operation of the trains too near the structures erected upon abutting property.²⁰ The construction of a railroad by an independent contractor upon the right of way and property of a railway company is not the exercise of a charter power or privilege by the contractor so as to render the railroad corporation liable for the contractor's negligence in the construction of the railroad.²¹

2069 Railroad construction and operation, Narr. (Fla.)

....., the plaintiff, complains of incorporated under the laws of Florida, because the defendant against the protest and without the consent of plaintiff constructed its railroad over the following described lands of plaintiff lying and being in said state and county, to wit: (Set forth description), thereby doing great damage to plaintiff by subjecting him to inconvenience from defendant's trains, dividing his land into inconvenient shape for enclosing it, digging up the land and embanking other portions of it, interfering with the natural drainage of the same, keeping a portion of it perma-

²⁰ South Side Elevated R. Co. v. Neswig, 214 Ill. 463, 469 (1905).

²¹ Boyd v. Chicago & Northwestern Ry. Co., 217 Ill. 332, 337 (1905).

nently for its road bed and right of way, disturbing the rest of plaintiff by the noise of its trains, endangering the burning of plaintiff's fences by sparks from engines, subjecting the plaintiff's growing crops to the depredations of the workmen constantly repairing said road, and making it far more expensive to enclose said land than it otherwise would be were it not for the construction and location of said railroad. Plaintiff claims damages in the sum of dollars.

(Illinois)

For that whereas, the plaintiff was, on, to wit, the day of, 19.., and since hitherto has been and still is the owner and in possession of two certain dwelling houses, their privileges and appurtenances, situate and being upon (Give description), and that the defendant was then and there, ever since has been, and now is possessed of, operating and running a certain railroad extending along and adjoining the said close, upon which said dwelling houses are situate, and was then and there running and using divers locomotive engines on the last mentioned railroad; and plaintiff avers that while said locomotive engines of the defendant, and under its control and management were then and there passing along and being used by the defendant as aforesaid upon said railroad, along the said close, divers sparks, brands of fire, smoke and soot, then and there escaped and were thrown from the same locomotives engines, by and through the mere carelessness, negligence and default of the defendant, into and upon said (Give description), and into and upon said dwelling houses and each of them then standing and being in said close of plaintiff's, so that by reason of said sparks, brands of fire, smoke and soot so thrown from said engines as aforesaid, said dwelling houses of the plaintiff's being then and there of great value, to wit, of the value of dollars, became and now are useless, not habitable, and of no value, and wholly lost to the plaintiff, and said (Give description) was, and is thereby greatly depreciated in value, to wit, dollars.

2. And whereas, also, the said defendant, on, to wit, the day of, 19.., and on divers other days and times between that day and the commencement of this suit, was in possession of and claiming to own a certain lot, piece or parcel of ground described as follows, to wit: (Give description), and was so in possession of said premises, building, filling, grading, laying ties, irons, tracks, railroads and making other improvements therein and thereon; and the said defendant, by its servants on the date aforesaid and on divers days and times subsequent thereto, while so prosecuting said building, filling, grading and other improvements upon and in said premises, so carelessly, negligently and improperly prosecuted

said work that the plaintiff, who then and ever since said dates and times aforesaid, was the owner and possessed of (Describe property) in the subdivision aforesaid (and immediately adjoining the said possession of the defendant) was greatly injured and damaged in his said property, premises and possession aforesaid; and the same and certain improvements thereon, to wit: two houses and fences of the plaintiff then being upon her premises aforesaid, were greatly injured, damaged and destroyed, and vast quantities and floods of water thrown upon the lot and premises of the plaintiff thereby rendering the said houses, premises, etc., of the plaintiff unfit for use and occupancy, and greatly damaging and injuring the plaintiff; whereby and by means thereof the plaintiff has been damaged to the amount of, to wit, dollars.

By means of which several premises, the plaintiff during all the time aforesaid was greatly annoyed and disturbed in the peaceable possession of said dwelling houses, and did not enjoy them in as full and ample a manner as she otherwise would have done.

Wherefore, etc.

2070 Surgical operation, Narr. (Ill.)

For that whereas, before and at the time of committing the several grievances hereinafter mentioned, in the county aforesaid, to wit, at the city of, in the county of, and state of Illinois, the defendant was exercising the profession of a physician, and while exercising said profession, held himself out to the plaintiff to have and possess great knowledge and skill in his said profession as a physician and surgeon, as aforesaid; that the plaintiff, relying upon the representations of the defendant as to his skill and ability as such physician and surgeon, as aforesaid, and believing them to be true, on or about the day of, 19.., and while the defendant was exercising such profession, then and there retained and employed the defendant, as such physician, for reward and hire, to treat the plaintiff for the cure of a certain sickness and malady from which she, the plaintiff, was then and there suffering; that thereupon, the defendant, as such physician, then and there accepted such retainer and employment and stated and represented to the plaintiff, that if she, the plaintiff, would place herself under the care and treatment of the said defendant, he, the said defendant, possessed and would exercise the skill necessary to successfully treat and cure her, the said plaintiff, of her said sickness and malady; that the plaintiff, relying upon the representations of the defendant as aforesaid and believing them to be true, consented to, and did place herself under the care and treatment of the said defendant, at a certain hospital or sanitarium, located at, in the city of, in the county and

state aforesaid, of which hospital or sanitarium the said defendant was the owner, or had, then and there, some beneficial interest therein, and to which said sanitarium or hospital the defendant then and there requested the plaintiff to go for the purpose of receiving medical treatment from the defendant, as aforesaid.

And the plaintiff avers that the defendant then and there represented to the plaintiff that it would only be necessary for her to have medical treatment, and that no surgical operation would be necessary, but that after plaintiff had, at the time and place last aforesaid, placed herself under the care of the said defendant as aforesaid, he, the defendant, without the knowledge or consent of the plaintiff, and without the knowledge or consent of any one authorized to act for and on behalf of the plaintiff, administered to the plaintiff an anæsthetic or narcotic, and while the plaintiff was and remained under the influence of the drug administered by the defendant, and without the knowledge or consent of the plaintiff, the defendant then and there removed the uterus of the plaintiff; whereby, and by reason whereof, this plaintiff suffered great bodily pain, and was confined to her bed for a long period of time, to wit, for about the space of weeks; and by reason of said operation plaintiff became sick, sore and disordered, and so remained for a long space of time, to wit, from thence hitherto; and plaintiff's general health has been greatly impaired thereby, and plaintiff's mental powers have been greatly impaired, to the damage of the plaintiff of dollars, and therefore she brings this suit.

2071 Trees and shrubs, destruction, Narr. (Ill.)

For that whereas, on, to wit, said day of, 19..., and on divers other days and times between that day and the commencement of this suit, with force and arms, the defendant broke and entered a certain close of the plaintiff, situated in the county aforesaid, then and there in her possession, and then and there cut down and destroyed, to wit, shade tress of the plaintiff of the value of dollars, and dug up and destroyed, to wit, shrubs and plants of the plaintiff of the value of dollars, and disposed of the same to their own use; and other wrongs to plaintiff then and there did, against the peace of the people of this state, to the damage, etc.

(Mississippi)

That is a corporation duly and legally chartered under the laws of the state of Mississippi and having its domicile at county, Mississippi, that as such corporation, it is engaged in the manufacture and sale of all

kinds and all dimension of pine lumber for sale to the general public; that for the purpose of carrying on such a business it is engaged in cutting, removing and hauling pine trees to its mill at county, Mississippi, in order to manufacture said trees into merchantable lumber and to sell same for profit.

That said defendant has in its employment, for the carrying on of its said business, a large number of agents and employees; that on the day of, 19.., the defendant had a number of agents and employees cutting and removing its pine trees as aforesaid in county, Mississippi, and that defendant, through its said agents and employees acting for their master and within the scope of their authority, knowingly, negligently, recklessly, wilfully and oppressively, entered in and upon plaintiff's land, to wit (Set forth legal description), situated, lying and being in county, Mississippi, and did then and there knowingly, recklessly, wilfully and oppressively and without plaintiff's knowledge or consent, and over his protest, without any right, and in violation of the law of the state of Mississippi, cut and remove pine trees standing on plaintiff's land hereinbefore described, and did appropriate the same to its own use, benefit and profit.

Plaintiff, therefore, sues and demands judgment in the sum of dollars for the statutory penalty of dollars per tree for the cutting and removing of said trees as aforesaid.

2. For a second count herein, plaintiff alleges and charges that the actual damages done him by the defendant in cutting and removing said trees as aforesaid, situated and standing on plaintiff's land as hereinbefore described is dollars per tree, and that the number of trees cut or removed off of said land as aforesaid, is; wherefore he sues and demands judgment for dollars, the actual value of the damages sustained by plaintiff.

2072 Undermining farm, Narr. (Md.)

For that the said is now and has been since and prior to the happening of the injuries hereinafter complained of the owner in fee simple of a valuable farm or tract of land situated and lying in county, Maryland, near the town of, containing acres, which was conveyed to the said by and, his wife, by deed dated the day of,, and recorded in liber No., folio, one of the land records of county, Maryland, with a reservation however of the coal underlying said farm, which coal was subsequently conveyed by a lease to the defendant and was so owned by the defendant at the time of the griev-

ances hereinafter complained of. That the said land constitutes a valuable farm of the said of which the plaintiff,, was in actual possession and enjoyment at the time of the happening of the injuries hereinafter set forth, the same being improved with a large and comfortable residence, stable and other out buildings, valuable orchards and fruit trees of various kinds and productive vineyards and large springs of abundant pure fresh water, which before and at the time of said grievances had flowed and had been used to flow from time immemorial and still of right ought to flow in great abundance, and which were of great value to the said farm, and a rich and productive soil.

And that the said defendant is now and at the time of the said grievances was a corporation duly incorporated under the laws of Maryland, engaged in mining and operation of coal mines, and at the time of the said grievances was mining and excavating the said coal leased as aforesaid to the defendant, which said coal underlay the said premises of the said , and that the said defendant on or about the day of, 19.., while digging and mining the said coal underlying the said premises of the plaintiff and supporting the same and while removing the said coal, so negligently operated said mine, and so negligently dug, excavated and removed the said coal which supported and maintained the said house and other buildings, trees, springs and soil of the plaintiff's premises, that the support to the said house and its foundation was taken away, the water and moisture was taken from said trees and vineyards and the sources of said springs were diverted, and the surface of the soil became broken and cracked, and that by reason thereof, all of which was due to the defendant's negligence as aforesaid, the house and its foundations and walls were almost wholly destroyed, the said fruit trees and vineyards were rendered barren and died, and the said springs were wholly destroyed and entirely ceased to flow and dried up, and the surface became irregular and full of sunken places, sink holes, ridges and cracks and open places of considerable depth, and therefore dangerous to persons passing over the same, and that in consequence thereof, the said farm has been rendered almost valueless; and that the said defendant other damage and injury to the said plaintiff's premises then and there did to the great loss and damage of the plaintiff; and that the said injuries to the said plaintiff's premises were caused wholly by the negligence of the defendant in digging, excavating and removing the said coal in a careless and negligent manner and not in any way by reason of any fault of the plaintiff; and therefore the plaintiff brings this suit and claims dollars damages.

SPECIAL DEFENSES, PLEAS, ETC.

2073 Accord and satisfaction, pleading

Accord and satisfaction must be specially pleaded in an action of trespass.²²

2074 Aggravation, matter of, new assignment

A new assignment is necessary to bring forth and to convert the aggravation of a trespass into a substantive cause of action.²³

2075 Assault and battery; justification, railroads

In an action for assault and battery against a railroad company, it is a good defense to allege and prove that the conductor, by virtue of the authority conferred on him by statute, acting for the state of Illinois and not for the defendant, arrested the plaintiff without process, using no more force than was necessary, and that such arrest constituted the assault complained of.²⁴ The statute which prohibits intoxication on railroad passenger cars, stations and platforms is valid.²⁵

2076 De injuria, test

A replication *de injuria* (*de injuria sua propria absque tali causa*, or, *de injuria absque residuo causae*) is appropriate where the matter set up in defense merely amounts to an excuse of the act complained of and is not the exercise of an affirmative right; the replication must be special, not *de injuria*, etc., where the defense consists of a positive and absolute right.²⁶ In determining the particular replication to be filed, the true test is not whether the plea to be traversed sets up matter of record, but whether the matter set forth is in excuse or affirmative.²⁷ In trespass, a replication *de injuria* is sufficient without a new assignment, where the defendant pleads a justification.²⁸

2077 De son tort demesne, replication

That the said defendant at the said time, when, etc., of their own wrong, and without the cause by them in their said

²² Kenyon v. Sutherland, 3 Gilm. 99, 102, 103 (1846).

²³ Galt v. Chicago & Northwestern Ry. Co., 157 Ill. 139.

²⁴ Tarantina v. Louisville & Nashville R. Co., 254 Ill. 624, 626 (1912); Laws 1911, p. 462.

²⁵ Tarantina v. Louisville & Nashville R. Co., 254 Ill. 628.

²⁶ Allen v. Scott, 13 Ill. 80, 84 (1851).

²⁷ Allen v. Scott, *supra*.

²⁸ Lincoln v. McLaughlin, 74 Ill. 11, 13 (1874).

plea alleged, committed the said several trespasses in that plea mentioned, in manner and form as the said plaintiff has in his said declaration complained against the said defendants; and of this they put themselves upon the country, etc.

b

That said defendants, , committed the several trespasses in said declaration mentioned of their own wrong, and not at the request and command of said company, as is in said pleas set forth; and of this they put themselves upon the country, etc.

c

That said defendants, , at the time, when, etc., committed the said several trespasses in the said declaration mentioned of their own wrong, and were not at the time, when, etc., the servants or agents of said ; and of this they put themselves upon the country, etc.

2078 Ejection from street car; justification, plea (III.)

That the defendant before and at the said time when the plaintiff complains of the said alleged trespasses was lawfully possessed of and operating a certain street car for the conveyance of passengers, in consideration of a certain reward to be paid the defendant by the said passengers, situate in the city of , county and state aforesaid, and the said street car was then and there in the charge and control of a certain servant of the defendant in that behalf, to wit, a certain conductor; and the defendant being so possessed thereof and so operating the same, the plaintiff, just before the said time when the plaintiff complains of the said alleged trespasses, to wit, on the same day in the said declaration mentioned, entered the defendant's said street car to be carried therein as a passenger, and with force and arms improperly conducted and deported himself therein, contrary to the reasonable and lawful rules of the said defendant then and there provided for the regulation and conduct of its passengers; and then and there the defendant, by its servant, to wit, the said conductor, requested the plaintiff at divers times to pay to the defendant the customary and usual fare or reward for the carriage of the plaintiff in the defendant's said street car, which the plaintiff then and there wholly refused to do; and without paying to the said defendant the usual and customary fare or reward due the defendant for the carriage of the plaintiff, the plaintiff continued in the said street car without the leave or license and against the will of the defendant, and during all that time very greatly disturbed the defendant in the

peaceable and quiet possession of its said street car; and thereupon, the defendant, by one of its servants, to wit, the said conductor, caused said street car to be stopped and then and there requested the plaintiff to depart from and out of the said street car, which the plaintiff then and there wholly refused to do; whereupon, the said servant of the defendant, to wit, the said conductor, gently laid his hands upon the plaintiff in order to remove, and did then and there remove the plaintiff from and out of the said street car, using no more force than was then and there necessary in that behalf, as he lawfully might for the cause aforesaid. And after the said servant of the defendant, to wit, the said conductor, had so removed the plaintiff from and out of the said street car as aforesaid, the plaintiff then and there made an assault upon the said servant of the defendant, to wit, the said conductor, and would then and there have beaten, bruised and ill-treated him if he had not immediately defended himself against the plaintiff; wherefore, the said servant of the defendant did then and there defend himself against the plaintiff, as he lawfully might for the cause aforesaid; and the defendant says, that in so removing the plaintiff from the said street car as aforesaid and in so defending himself against the plaintiff as aforesaid, the said servant of the defendant, to wit, the said conductor, did commit the supposed trespasses in the said declaration mentioned. So, the defendant says, that if any hurt or damage then and there happened to the plaintiff the same was occasioned in the removal of the plaintiff from the said street car as aforesaid and by the said assault so made by the plaintiff upon the defendant's servant, to wit, the said conductor, as aforesaid, and in the said servant's necessary defense of himself against the plaintiff; and this the defendant is ready to verify, etc.

Replication

That he did not enter the street car of the defendant with force and arms and improperly conduct and deport himself therein, contrary to the reasonable rules of the said defendant, and that he was not requested by the servant of the defendant, at divers times, to pay the customary and usual fare or reward for the carriage of the plaintiff in the street car of the said defendant; nor did the said plaintiff then and there refuse to do so; nor did the said plaintiff continue in said street car without leave or license and against the will of the defendant; nor did he, at the said time, disturb the defendant in its peaceable and quiet possession of its street car; nor was he requested by the servant of the defendant to depart from and out of the said street car; nor did he assault the said servant of the defendant; nor did the said servant of the said defendant defend himself against the assault of the said plaintiff. And as to this, the plaintiff doth put himself upon the country, etc.

2079 Force unnecessary, replication (Ill.)

That at and before the time, when, etc., the plaintiff was in the peaceable possession of said business house and building and that against the wish of the plaintiff at the county afore-said, the defendants unlawfully on the day of the week on the said day of, with a great multitude of people, in a manner to disturb the peace and good order of society with greater force and violence than was necessary, and of their own wrong broke and entered said business house and building and then and there wantonly and wickedly destroyed the personal property, the credit and the business of the plaintiff in manner and form as the plaintiff hath in its declaration herein complained against the said defendants; and this the plaintiff is ready to verify, etc.

Rejoinder

They did not, at the said time, when, etc., enter said close unlawfully with a great multitude of people, with greater force and violence than was necessary, without this, that said close was then in the possession of the plaintiff, and that defendants destroyed the property of the plaintiff in manner and form as is alleged in said replication; and this the defendants are ready to verify, etc.

Surrejoinder

That at the time, when, etc., the defendants did enter said close unlawfully in the said day of the week with a great multitude of people, in a manner to disturb the peace and good order of society, and wantonly and without cause destroyed the personal property, and the business and credit of the plaintiff in manner and form as the plaintiff hath complained against them; and of this the plaintiff puts himself upon the country, etc.

2080 Involuntary trespass, pleading

The defense that a trespass was casual or involuntary may be shown under the general issue.²⁹

2081 Justification and discharge, pleading

At common law, matters in discharge or justification of a trespass must be specially pleaded;³⁰ or notice of it must be given with the general issue.³¹

²⁹ Osburn v. Lovell, 36 Mich. 246, 250 (1877).

³⁰ Olsen v. Upsahl, 69 Ill. 277.

³¹ Osburn v. Lovell, *supra*; Rosenberg v. Angell, 6 Mich. 508, 513 (1859).

2082 Justification; notice, sufficiency

A notice with the general issue justifying under a writ of attachment is sufficient, although it fails to annex evidence which by law was made a part of the writ.³²

2083 Justification, chattel mortgage, plea (Ill.)

That at the time of the committing of the alleged trespasses in the declaration set forth, and the taking by the defendant of the goods and chattels therein set forth, the said plaintiff, A, was the of one, who, theretofore, to wit, on the day of, 19.., was the owner of the property and goods and chattels in said declaration set forth, and being such owner then and there made, executed and delivered in due form of law a chattel mortgage conveying the same to the said defendant, B, which said chattel mortgage was duly recorded in the recorder's office of said county, in book of records, on page; that said mortgage was made to secure the sum of dollars, a large portion of which, to wit, the sum of dollars on the date last aforesaid remained unpaid; and that by reason of the premises, the said defendant B, by agent, the said defendant,, took possession of said goods and chattels in said declaration mentioned, under and by virtue of the terms and conditions of said chattel mortgage, for the purpose of selling the same to satisfy the amount due and unpaid upon the indebtedness secured by said chattel mortgage; and that such proceedings were thereafter had, in pursuance of the terms and conditions of said chattel mortgage, that the said goods and chattels in said declaration mentioned were sold at auction to the highest and best bidder for cash, on, to wit, the day of, 19.., for the aggregate sum of dollars, which sum was not sufficient to extinguish the amount due and unpaid upon the indebtedness secured by said chattel mortgage; all of which the said defendant might lawfully do by virtue of the premises and said chattel mortgage; and this the defendant is ready to verify, etc.

2. And for a further plea in his behalf as to the breaking and entering the said premises in the said count of the said declaration mentioned, in the manner and at the times alleged in said count, and seizing and taking the said goods and chattels in the said count of said declaration mentioned, and converting and disposing of the same to his own use above supposed to have been done by the said defendant B, says, that before and at the time of the com-

³² *Rosenbury v. Angell*, 6 Mich.

mitting of the said alleged trespasses in the said declaration mentioned, divers goods and chattels of the said, then the of the plaintiff.. .., liable to be taken under and by virtue of the terms and conditions of said chattel mortgage, as set forth in the foregoing plea, were in and upon the said premises in the said declaration mentioned; and that thereupon, under and by virtue of the terms and conditions of said chattel mortgage, the said defendant B, agent, and by command, at the times aforesaid, peaceably and quietly entered into and upon the said premises in said declaration mentioned, the outer door thereof being then and there open, in order to seize and take, and did then and there seize and take, under and by virtue of the terms and conditions of said chattel mortgage, the said goods and chattels of the said in the introductory part of this plea mentioned, the same then and there being in and upon said premises; and in so doing, the said defendant B, and as agent, as aforesaid did then and there necessarily and unavoidably stay and continue therein for the said space of time in the said count of the said declaration mentioned, as they lawfully might for the cause aforesaid, doing no unnecessary damage to the said plaintiff on that occasion; which are the said several supposed trespasses in the introductory part of this plea mentioned, and whereof the said plaintiff hath above thereof in the count of said declaration complained against the said defendant B; and this the said defendant is ready to verify, etc.

2084 Justification, decree and as receiver, plea (Ill.)

That by the order and decree of this court, and on or about the day of, 19.., in a cause then pending in this court in chancery, wherein said D was complainant, and said M was defendant, said B was duly appointed and qualified as receiver of said premises in plaintiff's declaration mentioned, with authority to take possession thereof. And defendants further say that said defendant B, under and by virtue of his appointment and qualification as such receiver, to wit, at the said time, when, &c., and the other said defendants as his servants and by his command, peaceably and quietly entered into the said close and dwelling house in which, &c., and did then and there necessarily and unavoidably make as little noise and disturbance, as they lawfully might, for the cause aforesaid, doing no unnecessary damage to the said plaintiff; which are the said several supposed trespasses in said declaration mentioned; and this the said defendants are ready to verify, etc.

2085 Justification, mortgage, plea (Ill.)

That the said plaintiff, on, to wit,, 19.., and for a long space of time then last past, and from then until and at the said time, when, &c., held and enjoyed said premises in said declaration mentioned, being in the county aforesaid, as mortgagor thereof, to the said D, under and by virtue of a certain mortgage deed thereof, before then made and delivered by the said plaintiff to the said D, by the terms of which deed the sum of (\$.....) dollars was made payable by said plaintiff to said D, on the first day of each and every month from the date of said mortgage, to wit, And the said defendants further say that just before said time, when, &c., to wit, on the day of....., 19.., aforesaid, a large sum of money, to wit, the sum of (\$.....) dollars, of the payments aforesaid became and were due and payable from the said plaintiff to the said D, and from thence until and at the said time, when, &c., the payments continued due, in arrear, and unpaid. And said defendants further say that just before said time, when, &c., that is to say, after the said payments became due and payable, and when the same were actually due, in arrear and unpaid, said defendant D and the other said defendants as its servants and by its command, for the default of said plaintiff in the making of said payments according to the terms of said mortgage, peaceably and without force entered said close and committed the said several supposed trespasses in the said declaration mentioned, as they lawfully might, for the cause aforesaid; and this the said defendants are ready to verify, etc.

2086 Justification, replevin proceedings in justice court

A justice's judgment is conclusive upon collateral attack if all of the essential facts that are necessary to confer jurisdiction upon the justice are conferred and proved to exist.³³ A replevin judgment of the justice of the peace is *res judicata* in a collateral proceeding for the value of the property replevied.³⁴ It is a good defense to an action of trespass *vi et armis* that the plaintiff had recovered a judgment in a previous action of replevin for the same goods and damages.³⁵ A defendant may justify under a replevin default judgment and record of a justice of the peace without being compelled to show, affirmatively, by evidence *aliunde*, that the justice had jurisdiction.³⁶

³³ Rice v. Travis, 216 Ill. 249, 258, 260 (1905).

³⁴ Rice v. Travis, *supra*.

³⁵ Karr v. Barstow, 24 Ill. 580, 582 (1860).

³⁶ Rice v. Travis, *supra*.

2087 Justification, replevin proceedings in justice court; plea (Ill.)

And for a further plea in this behalf as to the taking and carrying away of the said (Describe property), being part of the goods, chattels and effects in the declaration mentioned, the said defendants, R, W and G, by their attorney, by leave of the court here for this purpose first had and obtained, according to the statute in such case made and provided, come and defend the force and injury, when, &c., and say that the said B ought not to have or maintain her aforesaid action thereof against them, because they say that just before and at the time, when, &c., in the declaration mentioned, to wit, on the day of, 19.., one M constituted and appointed the defendants R and W and one E M the agents of him, the said M, to replevin the goods, chattels and effects in the declaration mentioned; that thereupon, to wit, on the day of, 19.., the defendants W and R, and the said E M, being such agents, went and appeared before one J, who was then and there a justice of the peace in and for the county of, in the state of Illinois, and filed with said justice of the peace his certain affidavit for replevin in words and figures following, to wit: (Insert affidavit).

That thereupon a certain writ of replevin was issued by said justice of the peace, which said writ of replevin was duly delivered to the defendant G, who was then and there a constable in and for the county of aforesaid, to execute said writ: that before the execution of said writ of replevin, the defendants, W and R, acting in behalf of the said plaintiff M, gave to the said G, who was then and there a constable as aforesaid, a bond with sufficient security in double the value of the property about to be replevined, which said bond was taken and approved by said G, constable as aforesaid, on the day of, 19.., and is in words and figures following, to wit: (Insert bond).

That afterward, on, to wit, the day of, 19.., the said G, being then and there such constable, executed such writ of replevin by seizing and delivering to said M the following described property, to wit: (Describe property), being part of the property in said writ mentioned, and by reading to said B, in said writ mentioned, and made return thereon in words and figures following, to wit: (Insert return). Which said seizing and delivering are the said supposed trespasses in the introductory part of this plea mentioned and whereof the said plaintiff has above complained against them, the said defendants.

And the said defendants say that said B in said writ of replevin and the return thereon mentioned, is and was the said identical person as the plaintiff herein.

And these defendants further say that afterwards, to wit, on the day of, 19.., at the hour of o'clock .. M., said cause came on to be heard and was called for trial by and before said J, justice of the peace as aforesaid, and the said replevin suit was dismissed as to said and B and the said justice of the peace heard the evidence of witnesses and then and there made a finding that the said property so seized and delivered by said constable was then and there the property of the said M, and assessed the damages of the said M for the detention of said property while the same was wrongfully detained from him, at the sum of one cent, and it was therefore considered and adjudged by said justice of the peace that said property so seized and delivered by said constable as aforesaid was then and there the property of said M and that said M have and recover of said B the sum of one cent and his costs and charges in that behalf and have execution therefor. As by the record and proceedings thereof remaining with said justice of the peace, in the town of in the county of, and state of Illinois, more fully and at large appear, and which said judgment still remains in full force and effect, not appealed from and not in the least reversed or made void.

And these defendants further say that since said judgment was rendered as aforesaid the said M has in no way sold, disposed of or delivered said property to the said plaintiff herein, nor to any person through or by whom the said plaintiff claims title to said property so seized and delivered by said constable as aforesaid; and this the said defendants are ready to verify, etc.

Replication

That protesting that the said proceedings in the said plea mentioned was not had or taken in manner and form as said defendants have in said plea above alleged, nevertheless the said plaintiff says that the defendants at the time, when, etc., of their own wrong, and without the residue of the cause in that plea alleged, committed the trespasses in said declaration mentioned in manner and form as the plaintiff therein has above complained against them; and of this plaintiff puts himself upon the country, etc.

b

That although true it is that the said writ in said plea mentioned was delivered to the said defendant G as constable as is in and by said plea alleged, nevertheless the said plaintiff says that the defendants at the time, when, etc., of their own wrong and without the residue of the cause in that plea alleged, committed the trespasses in said declaration men-

tioned in manner and form as the plaintiff therein has above complained against them; and of this plaintiff puts himself upon the country, etc.

LEAVE AND LICENSE

2088 Pleading

In Illinois, leave or license is admissible under a plea of not guilty.³⁷ But not so in Michigan; there, license cannot be relied on, unless notice thereof is given with the general issue.³⁸

2089 Corporations, plea (Ill.)

That the said defendant the company, the other defendants then and there being the officers and servants of said company and acting for it, at its request and command, by the leave and license of the plaintiff to it for that purpose given and granted, committed the several supposed trespasses in the said declaration mentioned, as it lawfully might for the cause aforesaid; and this the defendant is ready to verify, etc.

2090 Corporations; replication, fraud and recall (Ill.)

That said supposed leave and license, if any such were ever given, was obtained by false and fraudulent representations and deceit of and by the said defendant, the company, for replication nevertheless, in this behalf the said plaintiff saith, that before the said time, when, etc., in said declaration mentioned, to wit, on and before the day of, 19.., at said county, the said supposed license was revoked, recalled, and countermanded by the plaintiff; and this the plaintiff is ready to verify, etc.

2091 Corporations; replication, peaceable entry (Ill.)

That the said supposed leave and license of the plaintiff to the defendants, or any one or either of the defendants, if any such was by the plaintiff given and granted, was leave and license to enter peaceably and in a lawful manner, and was not leave and license to enter said premises in a riotous and disorderly manner, with a great multitude of people on the day of, to destroy the personal property and the business of the plaintiff, as was done by the defendants in manner and form as the plaintiff hath in its declaration

³⁷ *Kapischki v. Koch*, 180 Ill. 44 (1899); *Papke v. Hammond Co.*, 192 Ill. 631 (1901); *Chicago Title & Trust Co. v. Core*, 223 Ill. 63.

³⁸ *Senecal v. Labadie*, 42 Mich. 126, 127 (1879); *Vanderkarr v. Thompson*, 19 Mich. 82, 87 (1869).

herein complained against the defendants; and this the plaintiff is ready to verify, etc.

Rejoinder

They did not, at the said time, when, etc., enter said close in a riotous and disorderly manner with a great multitude of people; and of this they put themselves upon the country, etc.

2092 Corporations; replication, waiver (Ill.)

That if any such supposed leave or license was given or granted the same was by the said defendants thereafter at and before the time, when, etc., waived and canceled at the request of the plaintiff; and this the plaintiff is ready to verify, etc.

Rejoinder

That the said leave and license in the said plea mentioned was not, at or before the said time, when, etc., waived and canceled; and of this they put themselves upon the country, etc.

2093 Individuals, plea (Fla.)

That the said entry and construction was by leave and permission of plaintiff.

(Illinois)

That the said defendant.., at the said several times, when, etc., by the leave and license of the said plaintiff.. to ..h.. for that purpose first given and granted, to wit, at the county aforesaid, committed the said several supposed trespasses in the said declaration mentioned, as ..he.. lawfully might for the cause aforesaid; and this the said defendant.. ready to verify, etc.

2094 Individuals, replication (Ill.)

That the said defendant.. at the said several times, when, etc., of ..h.. own wrong and without the leave and license of the plaintiff.. to ..h.. the defendant.. for that purpose given and granted, committed the several supposed trespasses in manner and form as the plaintiff.. ha.. above thereof complained against ..h..; and this the plaintiff.. pray.. may be inquired of by the country, etc.

b

That the defendant.. with a large gang of servants and by means of threats and bodily injury to ..h.. servants and agents and by the use of excessive and more than necessary force and power against the will or consent of the plaintiff.. with force and arms over-powered the plaintiff.. and ..h.. servants and agents and in a disorderly and riotous manner broke into and entered said close and premises while the plaintiff.. w.. in lawful and peaceable possession thereof, and with like force and in a similar manner, did seize, take, break, scratch, dent, mutilate, destroy and carry away the said goods and chattels to a great distance, and did unnecessary and great damage to said goods and chattels; and this the plaintiff.. ready to verify, etc.

2095 Surgeon, consent

The surgeon may lawfully act on his own discretion, and this is his duty, without the consent of the patient or his relatives, making the highest use of his skill and ability to meet exigencies which might confront him, where the patient desires or consents that an operation shall be performed upon him and unexpected conditions develop or are discovered in the course of the operation, or where it is found that some action must be taken immediately for the preservation of the life or health of the patient and it is impracticable to obtain his consent or of anyone authorized to speak for him.³⁹

2096 Surgeon, consent, plea (Ill.)

That he, the said defendant, at the time, when, etc., was a physician and surgeon, duly licensed and lawfully practicing in the county and state aforesaid, and as such physician and surgeon he was employed by the said plaintiff to remove the uterus of said plaintiff and by the leave and license of the said plaintiff to him for that purpose given and granted, committed the several supposed trespasses in said declaration mentioned, as he lawfully might for the cause aforesaid; and this the defendant is ready to verify, etc.

Replication

That it is not true that she, the plaintiff, employed the defendant to remove the uterus of the plaintiff, and that the defendant committed the several trespasses in the declaration mentioned by the leave and license of the plaintiff, as charged in said plea. And plaintiff avers that said trespasses were

³⁹ Pratt v. Davis, 224 Ill. 309.

committed as charged in said declaration, and without the consent of the plaintiff. And of this she puts herself upon the country, etc.

2097 Third person, plea (Ill.)

That the said close in said declaration mentioned, and in which, &c., now is, and at the said several times, when, &c., was the close, soil, and freehold of ; wherefore, the said defendants, and each of them, by the leave and license of the said, to them for that purpose first given and granted, to wit, at the county aforesaid, committed the said several supposed trespasses in the said declaration mentioned, in the said close, in which, &c., so being the close, soil, and freehold of the said, as they lawfully might, for the cause aforesaid, which are the said several supposed trespasses whereof the said plaintiff hath above thereof complained against them, and this they are ready to verify, etc.

LIBERUM TENEMENTUM

2098 Liberum tenementum defined

A plea of *liberum tenementum* claims the *locus in quo*, or place in which the alleged trespass was committed, to be the defendant's or that of a third person by whose command the defendant entered.

2099 Nature and scope

This plea puts in issue the title or ownership of the particular close entered upon,⁴⁰ and involves a freehold.⁴¹

2100 Burden of proof

Under a plea of *liberum tenementum*, the burden of proof is not upon the plaintiff, but it is upon the defendant to prove his claim of title to the land in controversy by a preponderance of the evidence.⁴²

2101 Corporation, plea (Ill.)

That the said business house and building in the said declaration mentioned, and in which, etc., at the several times, when, etc., were the close, soil and freehold of the said

⁴⁰ Galt v. Chicago & Northwestern Ry. Co., 157 Ill. 139.

⁴¹ Rich v. Naffziger, 248 Ill. 455, 456 (1911).

⁴² Rich v. Naffziger, 248 Ill. 461.

defendant, the company, to wit, at the county aforesaid; wherefore, the said defendant the company and the said other defendants as its officers and servants, at its request and command, at the said several times, when, etc., committed the said several trespasses in the said declaration mentioned in the said close as it lawfully might for the cause aforesaid; and this the defendants are ready to verify, etc.

Replication

That the said business house and building, in said declaration mentioned, was not at the time, when, etc., the close and freehold of the defendant company, in manner and form as the defendants have in said plea alleged; and of this the plaintiff puts himself upon the country, etc.

2102 Individual, plea (Ill.)

That the close in the said declaration mentioned, and in which, etc., now is, and at the said several times, when, etc., was the close, soil and freehold of the defendant; wherefore, the defendant at the said several times, when, etc., committed the several supposed trespasses in the said declaration mentioned, in the said close in which, etc., as he lawfully might for the cause aforesaid; and this the defendant is ready to verify, etc.

Replication

That the said close in which said alleged trespass was committed is not now and at the said several times of said alleged trespass, etc., was not the close, soil and freehold of the defendant in manner and form as he has above in his said plea alleged; and of this the plaintiff puts himself upon the country, etc.

2103 Third person, plea (Ill.)

That the said close in the said declaration mentioned, and in which, &c., now is, and at the said several times, when, &c., was the close, soil, and freehold of the said to wit, at, &c., aforesaid. Wherefore the said in its own right, and the said and as its servants, and by its command, at the said several times, when, &c., committed the said several supposed trespasses in said declaration mentioned, in said close in which, &c., so being the close, soil, and freehold of the said as they lawfully might for the cause aforesaid, which are the said supposed trespasses, whereof the said plaintiff hath above thereof complained against them; and this said defendants are ready to verify, etc.

Replication

That the said close in which, etc., is not now, and at the said several times, when, etc., was not the close, soil and freehold of the defendants in manner and form as they have above in said plea alleged; and of this the plaintiff puts himself upon the county, etc.

2104 Notice, estoppel

The owner of land is under the obligation to assert his rights to prevent their infringement by others, as silence may raise an estoppel against him if he fails to speak when duty requires it of him and he has the opportunity. Fraudulent intention is not essential to an estoppel, where a fraudulent effect follows a party's former declarations or conduct.⁴³

2105 Son assault demesne; plea requisites

In a plea of *son assault demesne* the allegation that no more force was used than was necessary to repel the assault is material.⁴⁴

2106 Son assault demesne, plea (Ill.)

That the said plaintiff just before the said time, when, etc., in said count . . . mentioned, to wit, on the day and year in that count . . . mentioned, at, etc., aforesaid, with force and arms, etc., made an assault upon said defendant and would then and there have beat, bruised and ill-treated the said defendant, if he had not immediately defended himself against the plaintiff; wherefore, he, the said defendant, did then and there defend himself against the said plaintiff as he lawfully might for the cause aforesaid, and in so doing did necessarily and unavoidably a little beat, bruise, wound and ill-treat the said plaintiff and rend, tear, damage and spoil the said wearing apparel in said count . . . mentioned, doing no unnecessary damage to the said plaintiff on the occasion aforesaid; and so, the said defendant saith, that if any hurt or damage then and there happened to the said plaintiff, or his said wearing apparel, the same was occasioned by the said assault so made by said plaintiff on him the said defendant, and in the necessary defense of himself the said defendant against the said plaintiff; which are the same supposed trespasses in the introductory part of the plea mentioned, and whereof the said plaintiff hath above complained against him the said defendant; and this the defendant is ready to verify, etc.⁴⁵

⁴³ *Milligan v. Miller*, 253 Ill. 511, 517 (1912).

(1849); *Gizler v. Witzel*, 82 Ill. 322, 326 (1876).

⁴⁴ *Ayres v. Kelley*, 11 Ill. 17, 19

⁴⁵ *Ayres v. Kelley*, *supra*.

Replication

That the said defendant at the said time, when, etc., of his own wrong and without the cause by him in his said plea alleged committed the said several trespasses in the said plea admitted to be justified in manner and form as the said plaintiff hath above in said count... of his said declaration complained against the said defendant; and of this the plaintiff puts himself upon the country, etc.

(Maryland) Plea

That the plaintiff assaulted the defendant first and the defendant to protect himself did strike the plaintiff.

Replication

That he, the plaintiff, did not assault the defendant first, and that the defendant did not to protect himself, strike the plaintiff.

2107 Son assault demesne, replication de injuria, proof

In a replication *de injuria* to a plea of *son assault demesne*, the plaintiff may show that the defendant's beating was excessive and beyond all proportion of the offense committed.⁴⁶

GENERAL ISSUE

2108 General issue, scope

In trespass a plea of not guilty is a simple denial of the facts stated in the declaration, and controverts the truth of the allegations the plaintiff is bound to prove, and no more.⁴⁷ It raises the single issue whether the defendant is guilty of the trespass or not.⁴⁸ A plaintiff must prove the trespass notwithstanding a special plea in justification.⁴⁹ A plea of not guilty to an action of trespass for the taking of personal property operates merely as a denial of the taking; it does not draw in issue the right of property.⁵⁰

At common law a plea of the general issue to a trespass *quare clausum fregit* permitted the defendant to show title in himself,

⁴⁶ Ayres v. Kelley, *supra*.

⁴⁷ Chicago Title & Trust Co. v. Core, *supra*.

⁴⁸ Olsen v. Upsahl, 69 Ill. 277.

⁴⁹ West Chicago Street R. Co. v.

Morrison, Adams & Allen Co., 160 Ill. 288, 295 (1896).

⁵⁰ Harris v. Miner, 28 Ill. 135, 140 (1862).

or in some other person.⁵¹ In Michigan the general issue has the effect of merely denying the trespass, and the defense of title in the defendant is not available under that plea, but must be set up in a proper notice.⁵² Evidence which goes to the mitigation of damages is admissible under the general issue.⁵³

2109 Florida

The defendant, for a plea says that he is not guilty in manner and form as is in said declaration mentioned.

2110 Illinois and Mississippi

And the said defendant.., by, ..h.. attorney.., come.. and defend.. the force and injury, when, etc., and say.. that ..he.. or either of them are not guilty of the said supposed trespasses above laid to ..h.. charge, or any or either of them, in the manner and form as the plaintiff.. hath above thereof complained against ..h..; and of this said defendant.. put.. ..sel.. upon the country, etc.

2111 Maryland

The defendants, by, their attorney, for plea says that they did not commit the wrong alleged; and the clerk will please note their defense on warrant.

b

The defendant for plea by his attorney,, says: For a first plea, that he did not commit the wrong alleged.

Replication

The plaintiff, by, his attorney, joins issue upon the first plea of the defendant.

VERDICT

2112 Illinois

We, the jury, find the defendant guilty and assess the plaintiff.. damages at the sum of (\$.....) dollars.

.....
Foreman.

⁵¹ Ostrom v. Potter, 104 Mich. 115, 117 (1895); Solomon v. Grosbeck, 65 Mich. 540, 544 (1887); Rawson v. Finlay, *supra*.

⁵² Ostrom v. Potter, 104 Mich. 118.

⁵³ Osborn v. Lovell, *supra*.

2113 Mississippi

We, the jury, find for the plaintiff and assess the damages at dollars.

2114 West Virginia

We, the jury, find for the plaintiff.. on the issues joined on the special pleas numbers against and fix the damages at the sum of dollars.

.....
Foreman.

JUDGMENT**2115 Damages**

In Michigan a general verdict under a declaration in trespass containing a count for trespass at common law and a count for statutory trespass, authorizes a judgment for single damages alone.⁵⁴

2116 Interest

It is proper to allow interest on the value of goods from the time of the wrongful taking.⁵⁵

2117 Appeal or error

In an action of trespass *quare clausum fregit* to which a plea of *liberum tenementum* is pleaded, a freehold is involved within the meaning of Illinois constitution and statute conferring jurisdiction upon the supreme court, provided the question of title is put in issue in a way as to necessarily invoke a decision upon that point, and error is assigned thereon.⁵⁶ But, in an action of trespass *quare clausum fregit* brought in a county court, an appeal from the judgment must be taken to the appellate and not to the supreme court, as a county court, under Illinois law, has no jurisdiction to try a case involving a freehold and to render a binding judgment as to the title, although it has jurisdiction to hear an action for damages not exceeding one thousand dollars for an injury to real estate.⁵⁷

⁵⁴ Osburn v. Lovell, 36 Mich. 251.

⁵⁵ Bradley v. Geiselman, 22 Ill. 493, 499 (1859).

⁵⁶ Douglass Park Building Ass'n

v. Roberts, 218 Ill. 454, 456, 457 (1905); Rich v. Naffziger, *supra*.

⁵⁷ Boyd v. Kimmel, 244 Ill. 545, 550 (1910).

2118 Illinois

⁵⁸ Therefore it is considered and ordered by the court that the plaintiff,, do have and recover of and from the defendant,, his said damages of dollars in form as aforesaid by the jury assessed, together with his costs and charges in this behalf expended, and have execution therefor.

2119 West Virginia

⁵⁸ Whereupon it is considered by the court that the plaintiff recover of the said defendant,, the sum of dollars, with legal interest thereon from this day until paid, and ..h.. costs in this behalf expended. Memo, etc.

⁵⁸ Precede this by recital of appearances, etc.

CHAPTER XXX

TROVER

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§§

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GENERAL ISSUE

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2153 West Virginia

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2154 Interest

2155 West Virginia

IN GENERAL

2120 Action, nature

An action of trover is in form *ex delicto* based upon the defendant's tort,¹ and is a species of the action of trespass on the case. The action is maintainable although the property which is

¹ Davis v. Taylor, 41 Ill. 405, 408 (1866).

claimed to have been converted has been delivered to the converter with the knowledge that it be commingled with other property of the same character.²

2121 Proof

At common law the plaintiff in an action of trover must prove property in himself, a right of possession at the time of the conversion, and the conversion of the property by the defendant to his own use, without disclosing the plaintiff's source of title.³

PARTIES

2122 Husband and wife

Trover may be brought against husband and wife jointly.⁴

2123 Tenants

One co-tenant may sue another for a conversion of the general property.⁵

DEMAND

2124 Necessity of

A demand and refusal is necessary to the maintenance of an action of trover where the possession of the property is obtained rightfully and which subsequently becomes wrongful: a demand is not necessary where the possession is wrongful from the beginning.⁶ The rules of demand in replevin are applicable to trover.

DECLARATION REQUISITES

2125 Damages, measure

The declaration in trover should claim damages for the injury complained of, the measure of damages being the value of the goods at the time of the conversion.⁷

2126 Joinder of counts

In an action of trover a count in case may be joined with a count in trover; and the plaintiff may proceed to trial under both

² German National Bank v. Meadowcroft, 95 Ill. 124, 129 (1880).

³ Eureka Iron & Steel Works v. Bresnahan, 66 Mich. 489, 493 (1887).

⁴ Davis v. Taylor, *supra*.

⁵ Ripley v. Davis, 15 Mich. 75, 79 (1866).

⁶ Bruner v. Dyball, 42 Ill. 34, 36 (1866).

⁷ Stirling v. Garritee, 18 Md. 468, 474 (1862).

counts without subjecting himself to an involuntary election between them.⁸

SPECIAL CAUSES AND DECLARATIONS

2127 Bank notes and coins, Narr. (Ill.)

For that whereas, heretofore, to wit, on the day of, 19.., in the county aforesaid, the plaintiffs were lawfully possessed as of their own property of divers notes of various banks and divers metal coins of lawful money of the United States of America, of the value of (\$....) dollars. And being so possessed thereof, the plaintiffs afterwards, to wit, on the day aforesaid, there casually lost the said bank notes and coins out of their possession, and the same afterwards, to wit, on the same day, there came to the possession of the defendants by finding.

Yet, the defendants, well knowing the said bank notes and coins to be the property of the plaintiffs, have not as yet delivered the same, or any or either of them, or any part thereof, to the plaintiffs, although often thereto requested, but have hitherto refused so to do; and afterwards, to wit, on the same day, there converted and disposed of the said bank notes and coins to their own use, to the damage, etc.

2128 Check, Narr. (Va.)

For this, to wit, that heretofore, to wit, on the day of, 19.., the said plaintiff was lawfully possessed of his own property, of a certain bill of exchange in writing, commonly called and known as a check, drawn by, upon the bank of, West Virginia, bearing date heretofore, on the day of, 19.., whereby the said requested the said bank to pay to the order of, the plaintiff in this suit, the sum of dollars. And being so possessed, the said plaintiff afterwards, to wit, on the day, month and year above mentioned, casually lost the said bill of exchange, commonly called and known as check or voucher, out of his possession, and the same afterwards, to wit, on the day, month and year first aforesaid, came into the possession of the said defendant by finding.

Yet, the said defendant, well knowing the said bill of exchange, check or voucher to be the property of the said plaintiff, and of right to belong and appertain to him, but contriving and fraudulently intending to deceive and defraud the said plaintiff in this behalf, hath not as yet delivered to the said plaintiff the said bill of exchange, check or voucher, or

⁸ Wait v. Kellogg, 63 Mich. 138, 144 (1886); Mutual Life Ins. Co. v. Allen, 212 Ill. 134, 136 (1904);

Eureka Iron & Steel Works v. Bresnahan, *supra*.

any part thereof, although often requested so to do; and afterwards, to wit, on the day, month and year last aforesaid, converted and disposed of the said bill of exchange, check or voucher, for money, to his own use, to the damage of the said plaintiff for dollars.

And therefore he brings his suit.

2129 Frame house, action

Trover or replevin is an appropriate remedy for the conversion of a frame house when it is so built as to constitute it personal property or when the defendant is estopped by his own act from denying it to be so.⁹

2130 Gaming; declaration, requisites

A declaration in the usual common law form of a count in trover, alleging the loss, finding and conversion, is sufficient to found an action upon the statute against gaming, without referring to the statute in such manner as to show that the action is under its provisions, and without setting forth special matter in the declaration,¹⁰ except that the declaration should conclude "whereby an action hath accrued to the plaintiff, according to the form of the statute."¹¹

2131 Ice, Narr. (Ill.)

For that whereas, on, to wit, the day of, 19..., and on divers other days and times between that day and the commencement of this suit, in the county of and state of Illinois, to wit, in the county of, aforesaid, the plaintiff was lawfully possessed as of his own property, of certain goods, chattels, property and effects, to wit, tons of certain ice situated and then and there upon the land of the plaintiff, to wit: (Insert legal description); in county,, to wit, in county aforesaid, which ice was of the value of (\$....) dollars; and being so possessed thereof the plaintiff afterwards, to wit, on the day aforesaid, and on divers other days and times between that day and the commencement of this suit, there casually lost the said goods, property, effects and chattels out of his possession, and the same afterwards, to wit, on the same day and on divers other days and times between that day and the commencement of this suit, there came to

⁹ Davis v. Taylor, 41 Ill. 407.

¹¹ Winchester v. Rounds, 55 Ill.

¹⁰ Winchester v. Rounds, 55 Ill. 454.
451, 452, 453 (1870).

the possession of the defendant by finding; yet, the defendant well knowing the said goods, property, effects and chattels to be the property of the plaintiff, has not as yet delivered the same, or any or either of them, or any part thereof, to the plaintiff, although often thereto requested, but has hitherto refused so to do; and afterwards, to wit, on the same day and on divers other days and times between that day and the commencement of this suit, there converted and disposed of the said goods, property, effects and chattels to its own use, to the damage, etc.

2132 Insurance; action, parties

A life insurance company is liable for the face value of a policy which it wrongfully converts.¹² The beneficiary in a life insurance policy who was entitled to the possession of the instrument at the time of its conversion may maintain an action for the same, or in case of an assignment of the policy to another as security, the action may be brought in the name of the beneficiary for the use of the assignee.¹³

2133 Insurance, Narr. (Ill.)

For that whereas, on, to wit,, 19.., said plaintiff was lawfully possessed as of her own property of a certain life insurance policy issued by said the, upon the life of her then husband,, who died on or about, 19..; which policy was dated, to wit,, 19.., and numbered, to wit,, insuring the life of the said in the amount of dollars, with a provision therein for an additional sum, the exact terms of which are unknown to plaintiff; and all of which sum, by the terms of said policy, was made payable to the plaintiff herein upon the death of the said, and which policy was, at the time of conversion thereof by the defendants as herein-after alleged, of the value of, to wit, the sum of dollars; and being so possessed thereof, she, the plaintiff, afterwards, to wit, on the day and year first aforesaid, casually lost said insurance policy out of her possession, and the same then and there came into the hands of the defendants by finding.

Yet, the defendants, well knowing that said policy of insurance was the property of the plaintiff, have not delivered the same to the plaintiff, although often requested so to do; and afterwards, to wit, on the same day the defendants then and there converted and disposed of the same to their own use and

¹² Mutual Life Ins. Co. v. Allen,
212 Ill. 139.

¹³ Mutual Life Ins. Co. v. Allen,
212 Ill. 138.

benefit, to the damage of the plaintiff of dollars, and therefore she brings suit for use, etc., as aforesaid.

2134 Loss of goods by carrier, Narr. (Ill.)

For that whereas, the said defendant before and at the time of the delivery to it of the goods and chattels hereinafter mentioned, was and from thence hitherto hath been and still is a common carrier of goods and chattels for hire; and whereas also the said plaintiff, whilst the said defendant was common carrier as aforesaid, to wit, on the day of, 19.., at, in the state of Illinois, to wit, at the aforesaid city of, caused to be delivered to said defendant, and the said defendant then and there accepted and received of and from the said plaintiff certain goods and chattels, to wit, of great value, to wit, of the value of dollars, to be safely carried and securely conveyed by the said defendant from, aforesaid, to the city of, aforesaid, and there safely and securely to be delivered for the said plaintiff for certain and reasonable reward to the said defendant in that behalf; yet the said defendant, not regarding its duty as such common carrier as aforesaid, but contriving and fraudulently intending craftily and subtly to deceive, defraud and injure the said plaintiff in this behalf, did not nor would safely or securely carry or convey the goods and chattels last aforesaid from, aforesaid, to the city of, aforesaid, nor there safely or securely deliver the same for the said plaintiff; but on the contrary, the said defendant so being such common carrier as aforesaid, so carelessly and negligently behaved and conducted itself in the premises that by and through the carelessness, negligence and default of said defendant in the premises, the goods and chattels last aforesaid, being of the value last aforesaid, have not been delivered to or for the said plaintiff at said city of or elsewhere, and afterwards, to wit, on the day and year last aforesaid, at the aforesaid city of, became and were wholly lost to the said plaintiff, to wit, at the city of, aforesaid.

And whereas, also, afterwards, to wit, on said day of, in the year aforesaid, at the city of, aforesaid, the said defendant at its special instance and request had the care and custody of plaintiff's certain other goods and chattels of like number, quantity, quality, description and value as those in said first count mentioned. Yet, the said defendant, not regarding its duty in that behalf did not nor would, while it so had the care and custody of the said last mentioned goods and chattels take due and proper care of the same nor any part thereof, but wholly neglected so to do, and took such bad care thereof, that afterwards, to wit, on the day

and year aforesaid, the said last mentioned goods and chattels became and were wholly lost to the said plaintiff, to wit, at the city of, foreshaid.

Wherefore, the said plaintiff saith that it is injured and hath sustained damage to the amount of dollars, and therefore brings its suit, etc.

2135 Pianoforte, Narr. (Mich.)

For that whereas, on or about the day of, 19.., at the of, said county, the said plaintiff was lawfully possessed as of his own property of a certain pianoforte, and being so possessed thereof he, the said plaintiff, to wit, on the day and year first above mentioned at, to wit,, of, in said county, casually lost the said pianoforte out of his possession, and the same afterwards, to wit, on the day and year aforesaid came to the said defendant by finding. Yet, the said defendant well knowing the said pianoforte to be the property of said plaintiff and of right to belong to and appertain to him, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in said behalf has not as yet delivered the said pianoforte, although often requested so to do, and has hitherto wholly refused so to do; and afterwards, to wit, at the of, in said county, to wit, the day and year aforesaid converted the said pianoforte to his own use, to the damage, etc.

2136 Promissory note, Narr. (Ill.)

For that, whereas, heretofore, to wit, on the day of, 19.., the said plaintiff.. w.... lawfully possessed of a certain promissory note in writing bearing date, on, to wit, the day of, 19.., made by, whereby the said promised to pay to the order of, a certain sum of money, to wit, the sum of dollars, at a certain time therein mentioned, and now past, to wit, in year.. after the date of said promissory note with interest thereon at the rate of per cent per annum, which said promissory note was, on, to wit, the day of the date of said note duly indorsed by the said, the payee thereof and by him delivered to the said plaintiff... And being so possessed, the said plaintiff.., afterwards, to wit, on the day and year first above mentioned, at, to wit, county aforesaid, casually lost the said promissory note out of his possession. And the same afterwards, to wit, on the day and year first above mentioned at, to wit, the county aforesaid, came to the possession of the said defendant.. by finding.

Yet, the said defendant.., well knowing the said promissory note to be the property of the said plaintiff.., and of right to

belong and appertain to him, but contriving and fraudulently intending craftily and subtly, to deceive and defraud the said plaintiff.. in this behalf, ha.. not as yet delivered the said promissory note to the plaintiff.., although often requested so to do, and ha.. hitherto wholly refused so to do; and afterwards, on, to wit, the day and year first aforesaid, at, to wit, the county aforesaid, converted and disposed of the said promissory note to ..h.. own use, to the damage, etc.

2137 Restored property, action

An action of trover is appropriate for the conversion of property that has been restored, to recover nominal or actual damages which have been sustained during the conversion and the return of the property.¹⁴

2138 Restored property; declaration requisites

In trover for the conversion of property which has been restored before the commencement of suit, the declaration must distinctly allege that special damages have been sustained during the conversion and the return of the property where it is sought to recover more than nominal damages.¹⁵

2139 Shares of stock, action

An action of trover is maintainable for a conversion of the shares of stock of a corporation.¹⁶

2140 Surplus from execution sale, action

The surplus arising from a valid execution sale cannot be reached by an action of trover either against the execution creditor or officer.¹⁷

2141 Timber, action

An action of trover is maintainable in the county where timber is converted, regardless of where it was cut.¹⁸

GENERAL DECLARATIONS

2142 Florida

For that whereas, the defendants converted to their own use, and wrongfully deprived the plaintiff of the use and pos-

¹⁴ Barrelett v. Bellgard, 71 Ill. 280, 282 (1874).

¹⁵ Barrelett v. Bellgard, *supra*.

¹⁶ Hine v. Commercial Bank, 119 Mich. 448, 449 (1899).

¹⁷ Eureka Iron & Steel Works v. Bresnahan, 66 Mich. 497.

¹⁸ Greeley v. Stilson, 27 Mich. 153, 154 (1873).

session of the plaintiff's goods, that is to say (Describe goods), all of the value of dollars, to the plaintiff's damage of dollars, and plaintiff claims dollars.¹⁹

2143 Illinois

For that whereas, heretofore, to wit, on the day of, 19.., at the city of, in said county, the said plaintiff was lawfully possessed as of his property of certain goods, chattels, wares and merchandise, to wit: (Describe property) of great value, to wit, of the value of dollars, and being so possessed thereof he, the said plaintiff, afterwards, to wit, on the day and year and at the place aforesaid, casually lost the same goods, chattels, wares and merchandise out of his possession, and the same goods, chattels, wares and merchandise afterwards, to wit, on the day and year and at the place last aforesaid, came to the possession of the said defendant by finding.

Yet, the defendant, well knowing the premises, and that the said goods, chattels, wares and merchandise, to wit, the said (Describe property) to be the property of the said plaintiff and of right to belong and appertain unto him, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not as yet delivered the said goods, chattels, wares and merchandise, to wit, the said (Describe property) or any, or either of them, or any part thereof, to the said plaintiff, although often requested so to do, and hath wholly refused so to do; and afterwards, to wit, on the day and year and at the place aforesaid, converted and disposed of the said (Describe property) to his own use, to the damage of said plaintiff of, and therefore he brings his suit, &c.

2144 Maryland

For that the defendant converted to his own use and wrongfully deprived the plaintiff of the use and possession of the goods and chattels of the plaintiff, that is to say of, of the value of dollars. And the plaintiff claims dollars.

SPECIAL DEFENSES, PLEAS, ETC.

2145 Election of remedies, pleading

A defendant in an action of trover may show, under the general issue, the plaintiff's previous selection of another remedy involving the same subject matter.²⁰

¹⁹ Leon v. Kerrison, 47 Fla. 178, 179 (1904); Par. 25, Sec. 1058, Rev. Stats.

²⁰ Thomas v. Watt, 104 Mich. 201, 207 (1895).

2146 Fraud, pleading

Under the general issue to a declaration in the usual form in trover the defendant may show that the plaintiff's claim is fraudulent and has no legal foundation. But where the declaration contains a count in trespass on the case setting up the plaintiff's source of title, a special plea or notice is necessary to show the fraudulent character of the title.²¹ In actions in which the declaration contains a count in case and a count in trover, a notice given with the general issue setting up fraud must state all of the facts constituting the fraud, as fraud is never presumed, nor is it inferred from slight circumstances.²²

2147 Justification of plaintiff's possession, pleading, waiver

In an action of trover against an officer who seizes property under execution, the necessity of pleading the general or special issues depends upon whether the action is brought for a conversion consisting in the seizure of the property, or whether the conversion relied upon is the seizure and sale of the property. Before sale of the property, the officer has a mere lien upon it, and justification under the writ of *fiere facias*, as title in a third person, must be specially pleaded; but if the sale is the conversion for which the action is brought, a justification may be given in evidence under a plea denying the plaintiff's possession, which is equivalent to the general issue.²³ The omission to give notice of justification under process in an action of trover against an officer for the seizure of property, is waived by proceeding to trial upon the merits without objection.²⁴

2148 Justification, lien for transportation charges, plea (Ill.)

That heretofore, to wit, on the day of, 19..., N and M, who the said defendant avers were then and there the owners of two carloads of (Describe property) named and described in the declaration herein, and for the recovery of the value thereof the said J brings this suit, delivered to the defendant the said (Describe property) in said declaration mentioned as a pledge to be kept by it, the defendant, until the said N and M should pay to the defendant all moneys due and to become due from said N and M to the said defendant by rea-

²¹ Eureka Iron & Steel Works v. Bresnahan, 66 Mich. 493.

²² Wait v. Kellogg, 63 Mich. 138 144 (1886).

²³ Eureka Iron & Steel Works v. Bresnahan, 66 Mich. 494.

²⁴ Frankel v. Coots, 41 Mich. 75, 78 (1879).

son of the transportation of said (Describe property) by the said defendant from, one of its stations, to the city of, a distance of, to wit, miles, and to pay and satisfy said defendant for all charges thereafter to become due upon said (Describe property) by reason of demurrage, unloading or warehousing the same. And the defendant avers that subsequently, while said (Describe property) was yet in the possession of the defendant ready to be delivered to the said N and M, of all of which the said N and M then and there had notice, there became and was due and owing from the said N and M to the said defendant, to wit, the sum of dollars, by reason of the said N and M wrongfully permitting said (Describe property) to remain in the care of the said defendant for the space of days, contrary to the rules and regulations of said defendant duly published, etc., of which the said N and M had notice, and for warehouse and other charges then and there due and owing from said N and M to the said defendant, which were then and there a like lien upon said (Describe property) in said declaration mentioned. And the said sum of money remaining unpaid, the defendant at the said time, when, etc., there detained the said (Describe property) in said declaration mentioned, as it lawfully might and should do as aforesaid for the cause aforesaid, which is the same detention in the said declaration above supposed; and this the defendant is ready to verify, etc.

2149 Set-off

The defense of set off is not permissible in an action of trover at common law.²⁵

2150 Title in defendant, pleading

The whole declaration is put in issue by a general denial in an action of trover at common law; and such a denial enables the defendant to prove that the title to the property is in himself, either absolutely, as joint owner, or special, as bailee or by way of lien.²⁶ In England since 1833, the general rules of practice limit the general issue in trover to a denial of the conversion alone.²⁷

2151 Title in third person, pleading

A defendant may prove under the general issue in an action of trover title in a third person to disprove the plaintiff's right of

²⁵ *Keaggy v. Hite*, 12 Ill. 99, 101 (1850).

²⁶ *Eureka Iron & Steel Works v. Bresnahan*, 66 Mich. 493; *McLean*

County Coal Co. v. Long, 91 Ill. 617, 621 (1879).

²⁷ *Eureka Iron & Steel Works v. Bresnahan*, *supra*.

possession, unless he is a wrongdoer and cannot connect his title with that of the third person.²⁸

GENERAL ISSUE

2152 Illinois

And the said defendant.., by, ..h.. attorney.., come.. and defend.. the wrong and injury, when, etc., and say.. that ..he.. not guilty of the said supposed grievances above laid to ..h.. charge, or any or either of ..h.., in manner and form as the plaintiff has above thereof complained against ..h.. in the count of h.. said declaration; and of this the defendant.. putsel.. upon the country, etc.

VERDICT

2153 West Virginia

We, the jury, find for the defendants.

JUDGMENT

2154 Interest

Interest is recoverable in an action of trover for property wrongfully taken and converted into money.²⁹

2155 West Virginia

³⁰ It is therefore considered that the plaintiffs take nothing by their complaint, and that the defendants go hence without day, and that the defendants recover of the plaintiffs their costs in this behalf expended, including dollars attorney's fees as allowed by law; and the plaintiffs objected and excepted.

²⁸ Stearns v. Vincent, 50 Mich. 209, 216 (1883); Ribble v. Lawrence, 51 Mich. 569, 572 (1883); Seymour v. Peters, 67 Mich. 415, 421 (1887).

²⁹ Schwitters v. Springer, 236 Ill.

271, 275 (1908); Hale v. Barrett, 26 Ill. 195, 198 (1861); Northern Transfer Co. v. Sellick, 52 Ill. 249, 254 (1869).

³⁰ Recite appearances, etc.

PART IV
STATUTORY AND OTHER ACTIONS

CHAPTER XXXI

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2157 General

2158 Partnership

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2159 Plea, *plene computavit*

2160 Replications

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2168 Form

SUMMONS

2156 Practice

Summons issues in the usual form, showing the proceeding as an action of account.

DECLARATION

2157 General (Ill.)

¹ In a plea that the defendant render to the plaintiff the sum of dollars, which the plaintiff says is justly due from the defendant, to balance book accounts between them, as by the plaintiff's original book, ready to be produced in court, may appear. Now the plaintiff says that the defendant, though often requested, has ever refused, and still does refuse, to settle and adjust the account of the plaintiff, or to pay the balance thereon due.²

2158 Partnership

For that whereas, heretofore, to wit, on or about the day of, 19.., the said became part-

¹ Commence as in *assumpsit*, substituting for "plea of *assumpsit*," "plea of account." See Section 211, Note 60.

² Sec. 5, c. 2, Hurd's Stat. 1911, p. 7.

ners in the mercantile business in said county, and they continued to do business together, as partners, until the month of, 19.., when by mutual consent the said partnership was dissolved, and the said went out of said business, leaving said in possession of all the assets of said firm. Those assets consisted of goods, wares and merchandise, and money and produce, to a large amount; and a great number of claims, consisting of notes, bills of exchange, and book accounts. Said sold all his interest to the goods then in the store and to the accounts unpaid on the store books for goods actually sold, and agreed to and did receive dollars in money for his interest in said goods and accounts, and a release of all the accounts and claims that said firm had against him, said individually.

In addition to said goods and accounts the said received at said dissolution a large sum of money on hand, and a large amount of produce, and cash notes, and bills receivable. And the agreement of said and at said dissolution was, that the said should collect said demands, and sell said produce, and render an account of sales, and an account of said money on hand, and the sums collected, to the said and to pay the one-half thereof to him, said, to wit, at the county and circuit aforesaid, so soon as the said sales could be effected, and said collections made.

The said now avers, that the said has long since sold all said produce, and collected said demands, to wit, to the sum of dollars, but to render said account to the said and to pay him his half thereof, he, the said, neglects and refuses, although by the said often requested to render said account and to make said payment; and so to do he has neglected and refused, to wit, at the county aforesaid.

Wherefore, the said prays judgment that the said render said account according to the laws of the state of Illinois, in such case made and provided; and that auditors be appointed to take and state said account.

Whereupon, the said prays judgment, to wit, for the sum of dollars, for which he sues, etc.

DEFENSES, PLEAS, ETC.

2159 Plea, plene computavit

That the dollars that the plaintiff admits in his declaration to have received, was in full of all his right, title and interest, of whatsoever nature and kind of in and to the effects of said late partnership; and this the defendant is ready to verify, etc.

2160 Replication

That the said dollars was not received in full of all his right, title and interest, of, to and for the claims set up and claimed in this cause, as the said defendant in said plea hath alleged; and of this the plaintiff puts himself upon the country, etc.

PRACTICE

2161 Order to account, etc.

This day come the parties, and the court being sufficiently advised, of the demurrers to the defendant's first and second pleas; the demurrer to the first plea is sustained, and the demurrer to the second plea is overruled. Whereupon, the plaintiff withdraws his demurrer to the said second plea, and files his replication; and the said defendant then withdrew said second plea; and the said defendant saying nothing further in bar, etc., it is ordered and adjudged by the court, that the defendant account, as provided by statute; and as demanded in the declaration filed herein, and, and are hereby appointed auditors, with all the powers given and directed by statute in said case, and the cause is continued; and it is further ordered that the clerk furnish the auditors with a copy of this order.

2162 Oath of auditors

Personally came (names of auditors) before me, the undersigned clerk of the circuit court of the county of and state of Illinois, and made oath that they would, as auditors in the above entitled cause, faithfully and impartially take and state the account between the parties to said suit, according to law and the evidence before them, and make report thereof as required by law.

In testimony whereof (clerk), etc.

2163 Report of auditors

To the circuit court of county, Illinois.

The auditors respectfully report that having themselves been first duly sworn, they were on the day of instant attended by the said parties and their attorneys at the office of in, when the said defendant filed a statement hereto attached marked "B," and the plaintiff filed his counter statement, also hereto attached and marked "C." The defendant also produced the books of account of the firm of, together with the vouchers herewith filed marked "D," etc.

And thereupon as well the said parties, as the witnesses by them respectively produced, were severally sworn by the audit-

ors, and examined on oath respecting the matters in controversy in the presence of said parties and their attorneys, the said examination being commenced on the day aforesaid, and continued by adjournment to the next day, when the same was concluded.

The auditors then proceeded carefully to consider the premises, and upon examination of the papers in the cause, the book statements and vouchers constituting the written evidence in the cause, and the oral testimony as well of the parties themselves, as of the other witnesses aforesaid, they do find:

1. That the mutual dealings of the said parties commenced on or about the day of, 19.., the style of their firm being and the joint trade being in merchandise, and produce, conducted at, in the county of, Illinois.

2. The contributions made by the respective partners to the joint stock were doubtless intended to be equal; no stock account having been kept, the separate interests of the parties can only be ascertained from their individual accounts in the ledger, in which the debits and credits of each appear to be truly stated. By these it appears that on, 19.., put in cash dollars; and that on the same date made up balance of dollars. The schedule herewith filed marked "E" exhibits the monthly balances to the credit of each partner as per ledger, to the close of their accounts, when the amount.. to credit of was dollars, and of, dollars. By this schedule it will be seen that the average amount.. of cash capital which had in the concern was dollars, and, dollars; and the total average of joint capital was dollars.

3. During the continuance of their partnership kept no stock account, merchandise account, cash account, interest account, expense account, or produce account. The only accounts kept by the concern was the account with customers, and the separate accounts of the partners; and their only books were a day-book and ledger, kept by single entry. The correctness of these books and accounts is undisputed, and the manner of keeping them we find to be precisely similar to the mode in which the books and accounts of the defendants since the dissolution of said firm have been, and are still kept.

4. We find that during the partnership the probable amount of merchandise of the firm was dollars, or thereabout, all of which had been paid for at the date of dissolution; when it appears there was remaining on hand dollars in goods and dollars in customers' indebtedness for goods sold. We find also per books that there was paid out in cash to partners and customers dol-

lars, and received from same in cash dollars. There was taken from customers, etc., in the course of trade per ledger this amount of wheat and corn, viz.: dollars, and paid for storage, threshing, freight, hauling, etc., dollars, and on account of rent and other expenses, including per cent, dollars, besides sundries for boarding, etc. This is information gleaned from the accounts of customers, and will serve to show how the merchandise, produce, and cash of the firm were disposed of in their business. We find also, that the practice of the parties in their purchase of produce was to buy in the county, giving receipts at the time, which were afterwards taken up in cash or in goods at the store. That produce was usually sold at subject to usual charges and expenses. From the nature of the case as exhibited by the manner of keeping the accounts of the concern, and the light which is furnished by those accounts, we are satisfied that merchandise and its proceeds were employed to pay for produce, and the proceeds and profits of produce were used to pay for merchandise, and that no separate account of profits either of merchandise or of produce was contemplated by the parties, nor could any such account be separately stated.

5. We find that the dissolution of the partnership took place, according to the books, somewhere between the and of, 19.., and that the probable date was the of the month.

An invoice having been made, agreed to purchase entire interest in the concern for the agreed sum of dollars, but that the bargain was not consummated. Not long afterwards, purchased from his interest for dollars, payable in equal instalments of months, and the partnership was actually dissolved by this sale at the date above mentioned. It is admitted that these payments were regularly made by to as the instalments matured.

The controversy between the parties arises out of the contract of sale from to which has just been referred to, the defendant claiming that he purchased the entire interest of his co-partner in the stock, credits, and effects of the concern, and the plaintiff insisting that he sold only his interest in the merchandise, notes and accounts of the firm, and that a reservation was made of certain items, variously stated to consist of cash, produce, and profits on produce which yet remain to be accounted for and divided.

It is observable, that the reserved items which the plaintiff contends to have remained to be divided, are differently specified by him on different occasions and times in the cause of these proceedings: (a) By the declaration, he claims for an equal share of a large sum of money on hand, and a large

amount of produce and cash notes and bills receivable; (b) by the paper marked "C," he claims an equal share of sundry items of cash on hand at dissolution, produce and profits made upon produce, grain sacks, and nails, amounting in gross, as he avers, to dollars; (c) and on his examination before the auditors, he waived his claim for cash notes and bills receivable, reasserted his claim for cash on hand, and with regard to the items of produce, and profits on produce, he declared his claim to be for produce on hand and profits of produce that ought to have been on hand; and afterwards, on the same examination, he declared that he claimed, not for produce but for profits of produce.

From the testimony before us, we find that immediately after the sale, took possession of all the partnership property and effects, and he continued the business in the same manner for his own separate account, although was living in the neighborhood; it is not pretended that ever claimed any interest in, or exercised any control over, the produce remaining on hand, or concerned himself about the business in any other way than is testified by, a witness to whom dollars was due at the date of dissolution on account of corn; that he asked the witness if had paid him, and told him he would have to look to, for he,, had sold out to him, and although in a conversation with the witness some months after the sale, complained that had obtained an advantage in the trade, it is remarkable that he did not then say anything about any reservation in the sale.

We are satisfied that contracted with his partner to buy him out entirely, and that if reserved anything, the reservation was not expressed in the contract. It is admitted that no demand was made upon by the plaintiff until last, a year after the last instalment of the purchase money became due and was paid. And it will be conceded by all who will look into the books of account of the concern, that no separate account of profits of produce could possibly have been contemplated by the parties, nor could such an account have been stated by any firm whose business and bookkeeping was managed as theirs was. As the item of profits of produce is not contained in the charges of the declaration, and as certain items therein specified, viz., for cash notes and bills receivable, have been waived by the plaintiff, we are only called upon to consider the weight of testimony as applied to the other items, viz., of cash and produce on hand. It is admitted by per his account that there was produce on hand at different places to the amount of dollars, and on his examination he stated the quantity to consist of a crib of corn, produce at and about corn sacks. The statement of

which he also filed, marked "F," states the quantity stored with him to be bushels of oats. The testimony of, who swears that by request of his father, the plaintiff, he went a day or two after the sale to ascertain the amount of produce, that there was on hand, exclusive of the corn in crib, sacks, bushels, oats. It is certainly possible that this discrepancy between the testimony of the last witness, and that of the defendant, may be accounted for by the fact that his count was made a day or two after the sale, when a greater amount of produce may have accumulated than was in hand at the sale. At all events the statement of, as far as it goes, would seem to support the representation made by of the stock on hand at the dissolution.

But admitting that the whole amount of produce stated by was then on hand, why was not property so susceptible of division as this, and the money besides, divided between the parties, and why was all claim on the part of deferred for months? Why did withdraw from the firm (with note for dollars), leaving him in full possession of all the effects of the partnership and retaining no voucher himself, not even a memorandum from that any interest remained to him in the concern? It would be difficult to explain such conduct upon any other principle than that the purchase by was a *bona fide* purchase of all the interest of in the produce, cash, and other assets of the firm whatever. That the sale was not for a consideration which could have been then considered as inadequate, is evident from the fact that a very short time before, the same parties agreed to a sale for dollars of interest to; and it is admitted that this was after a full account and invoice had been taken of everything. The testimony does not show that the business had improved after this invoice; on the contrary,, a witness who was also a merchant in, informs us that he returned home from on the of, in 19...; that about that time he heard both say that they had been disappointed in sales of bushels of wheat, which only brought cents in instead of dollars, as they expected; and that he understood them to say that they had lost on it. Another witness,, states that most of the money made on corn was made before the of of that year, and less was made afterwards; and that the fair value of either partner's interest in the whole concern was somewhere about dollars at and about the time of the dissolution, as shown from the account which we have been able to make of the stock and assets of that period, as follows, viz.: (Insert account). Leaving a balance of assets of dollars, which would

of course be subject to reduction by the amount of such other outstanding liabilities as might exist for rent, storage, commissions, etc. This statement exhibits a favorable result of the joint business, being very nearly per cent upon the capital invested.

We have no doubt from the whole testimony that the defendant by the purchase acquired all of his partner's interest in the concern without any exception or reserve, and his notes being fully paid, we do award that he has fully accounted to his said co-partner, as alleged in his plea filed before us, and that since the date of the dissolution of their said co-partnership, there have been no mutual dealings between the said parties. In arriving at our conclusions we have endeavored to explain and to reconcile much that is obscure, or contradictory in the testimony of the parties, by the evidence of the books, and the impartial testimony of other witnesses who were examined before us.

It is unfortunate for the parties, that their mode of book-keeping was imperfect, and it is not surprising that some difference of opinion should exist between them as to the results of their trade. But we think there is no reason for either one of them to withdraw from the other, the confidence which they seemed to have reposed in each other during the whole period of their joint dealings.

Our original memorandum of testimony, in which the exceptions from time to time made by plaintiff's attorney are noted, is herewith filed marked "G."

By request of plaintiff's attorney, the auditors add to their report that the plaintiff by his attorney objected to (State character of objection). He further objected to the admission of any testimony relative to the truth of that plea, and he also insisted that the order of the court required of the auditors to state an account of indebtedness from the defendant to the plaintiff, or from the plaintiff to the defendant.

Dated, etc.

.....
.....
.....

Auditors.

Auditors' fees for days each \$.;
paid by

2164 Exceptions

The plaintiff excepts to the report of the auditors made and returned in this case for this:

1. By judgment of this court the defendant was found guilty as charged in the plaintiff's declaration, and was adjudged to render an account, and said auditors were directed to take and return said account, whereas said auditors have disobeyed the

order of said court, and disregarded the law, and gone behind the judgment of the court and overruled the same, and reported that the defendant was not bound to account.

2. That said auditors converted themselves into a court of original jurisdiction, and permitted the defendant to appear before them as such court, and file pleas to the declaration; and said auditors proceeded to admit illegal, and improper testimony, and then and there proceeded to try the questions made by said plea, and totally disregarded the questions they were bound by the law and their oaths and the order of this court to try. They neglected to set a value or determine the value of the produce on hand, although they state the quantity thereof.

3. Said report is vague, prolix, argumentative and uncertain, and does not state the account between the parties as directed by the judgment of this court, and therefore is no report in the case.

For all of which the plaintiff demands that said report shall be set aside and for nothing taken, and that said cause be referred to other auditors with instructions to state and render the account between the parties, and compel said defendant to render said account to them as by law and the judgment of this court these said last auditors were bound to do.

.....
Attorney for plaintiff.

2165 Order setting aside and re-reference

On motion to set aside said report, and motion for judgment, the court disallowed said motion for final judgment in this case, and re-referred the cause to said auditors to audit and state an account in this case according to the demands of the declaration in this case.

2166 Amended report of auditors

The auditors to whom this cause was recommitted by the order of the court of county, made therein at the last term of said court, respectfully report:

That by consent of parties, the undersigned being a majority of the auditors (the other auditor being absent from the state) attended at the court house in on the instant in obedience to the order aforesaid, and the said parties also then and there appeared before us with their respective attorneys and witnesses. The plaintiff exhibited and relied upon the account heretofore filed by him on the of, 19... The defendant submitted and relied upon the account herewith returned marked "Y."

....., sworn and examined as a witness on the part of the plaintiff, and on the part of the defendant.

By consent of parties, the minutes of testimony given by the parties on their examination before the auditors in, 19.., were to be taken as, and for, their testimony on the present occasion.

Minutes of all the testimony so exhibited before us are herewith returned marked "Z."

After a careful consideration of the matters which have been recommitted to us by the order aforesaid, and upon the testimony aforesaid, we do now report that at the dissolution of the partnership the defendant was not indebted to the plaintiff for money on hand or on account of any produce and cash notes and bills receivable received by defendant on the dissolution of the partnership not being a part of or included in the goods in the store, nor the accounts unpaid on the store books for goods actually sold by the parties before their dissolution.

And as required, we do state the account between the parties as follows, viz.: (Attach account).

All of which is respectfully submitted to the said circuit court of county, Illinois.

Auditors' fees, etc.

2167 Motion for judgment

This day come the parties by their attorneys and file the report of the auditors, and the plaintiff enters a motion for judgment upon the report of the auditors as filed, for dollars.

JUDGMENT

2168 Form

This day again come the parties by their attorneys, and the court having been fully advised, upon the motion of the plaintiff orders that the same be sustained and that the plaintiff recover of the defendant the sum of dollars, balance due him upon his account as stated by the auditors. It is further ordered that the plaintiff recover of the defendant his costs by him herein expended and that execution issue for the balance of account due him as aforesaid, also his costs.

CHAPTER XXXII

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IN GENERAL

2169 Administration, necessity

No administration by next of kin or public administrator is necessary where there are no unpaid debts and no claims or demands due the estate, where the heirs at law are all qualified to act, or, being under disability, have someone legally qualified and responsible, under the law, to act for them, and where there is no dissension among them as to the amount to be distributed, or the manner of distribution.¹

2170 Administration, partnership

The death of a partner works an immediate dissolution of the partnership, imposing the duty upon the survivor to wind up and close out the business, and after paying the firm debts, to distribute the assets. No continuation of the partnership business is permissible,² even when its continuation after the death of a partner has been agreed to in the articles of co-partnership; and after such a death, any arrangement or agreement between the survivor and the heirs or personal representatives of the deceased partner for the continuation of the dissolved partnership, constitutes a new partnership, of which the survivor and the personal representatives or heirs are the members who become liable as such to creditors.³

¹ *Cotterell v. Coen*, 246 Ill. 410, 414 (1910); Sec. 18, Administration act as amended in 1905.

² *Andrews v. Stinson*, 254 Ill. 111, 123, 124 (1912).

³ *Andrews v. Stinson*, 254 Ill. 124.

2171 Administration, refusal

When a will has been duly proved and allowed the county or probate court has no power to refuse granting letters of executorship to persons legally competent to accept the trust and who are bound to discharge the same.⁴ Immorality does not render a person incompetent under Illinois statute to act as executor.⁵

2172 Administrator, stranger

A stranger to a class of heirs who are authorized to administer but who do not desire the appointment cannot be appointed an administrator upon the nomination of one of that class without a waiver to administer by all of those who belong to that class; and if there can be no unanimous nomination, the court may appoint the nominee of the majority of a particular class.⁶

2173 Dismissal

The petitioner in a proceeding for probate of a will has a right, in his own discretion, to abandon the cause and dismiss his petition in the county or probate court, or on appeal to the circuit court, before final judgment, even against the objection and protest of his adversary.⁷

2174 Jurisdiction, courts

In the probating of wills the county and probate courts have exclusive jurisdiction by the Illinois constitution and statute.⁸

2175 Jurisdiction, foreign wills

A foreign will is not subject to probate in Illinois, unless the testator died seized of lands or other real estate situated in Illinois.⁹

⁴ Clark v. Patterson, 214 Ill. 533, 539 (1905).

⁵ Clark v. Patterson, 214 Ill. 533, 541 (1905).

⁶ Justice v. Wilkins, 251 Ill. 13, 17 (1911); Sec. 18, Administration act (Ill.).

⁷ Hitchcock v. Green, 235 Ill. 298, 300 (1908).

⁸ Dean v. Dean, 239 Ill. 424, 426 (1909).

⁹ Davis v. Upson, 230 Ill. 327, 352 (1907).

2176 Jurisdiction, testamentary trusts

The Illinois constitution prohibits the investiture of probate courts, but not county courts, with jurisdiction over testamentary trusts, and the act which confers testamentary jurisdiction upon probate courts is unconstitutional.¹⁰

WAIVER AND RELINQUISHMENT

2177 Illinois

Estate of, deceased.

State of Illinois, }
County of } ss.

In the court of county, term, 19..

To honorable, judge of said court:
. widow., and, late of said county, deceased, do hereby relinquish and renounce all right, claim and preference which may have to administer upon the estate of the said deceased.

Witness . . . hand.. this day of, 19..

.
Widow of
Late of deceased.

2178 Maryland

¹¹ The undersigned, children of, of county, deceased, do hereby refuse to administer upon the estate of said deceased and do therefore renounce all our right, title and claim to the administration thereof, and pray that the court may appoint as administrators in our place or stead and our attorney

In testimony whereof, we hereunto subscribe our names this day of, 19..

(Signatures)

¹⁰ Frackelton v. Masters, 249 Ill. 30, 36 (1911); Secs. 18, 20, art. 6, Constitution 1870; Act of June 14, 1909 (Hurd's Stat. 1909, p. 698);

In re Mortenson's Estate, 248 Ill. 520, 523 (1911).

¹¹ See Section 211, Note 60.

APPLICATION FOR LETTERS

ADMINISTRATION

2179 District of Columbia, administrator to collect

Supreme Court of the District of Columbia,
Holding Probate Court.

| | | |
|-----------------|---|----------------|
| Estate of | } | No..... |
|, deceased | | Administration |
| | | Docket..... |

The petition of, one of the principal creditors of above named decedent, respectfully represents as follows:

1. That the above named departed this life in the District of Columbia on the day of, 19.., intestate, as far as your petitioner is informed and believes from any advice which he has at this time. That at the time of her death said decedent was a resident of the District of Columbia and a citizen of the United States of America. That from all the information or knowledge which your petitioner has, or has been able to acquire, said decedent left no next of kin or heirs at law surviving her. That during her life time said decedent resided at street in said city of at which place said decedent had certain personal property consisting of (Describe same) upon which petitioner would place an estimate value of not exceeding dollars.

2. That your petitioner believes that he is a just creditor of said decedent, and said decedent is and was at the time of her death, indebted to him in the sum of dollars, upon which there is also interest due.

3. Your petitioner is further advised by the District authorities that there is no person to take charge of said personal property or other assets of said decedent., if any, and that some suitable person should take charge thereof, pending administration, and that said property is now in charge of an officer of the District of Columbia until such time as the matter may properly be disposed of in court.

Wherefore, your petitioner prays that in the absence of all other persons claiming as next of kin, letters of administration be granted to him upon said estate, as a just creditor of decedent; that there be due order of publication against all persons known or unknown, who might be entitled to administer upon said estate; that pending such appointment as administrator, your petitioner be appointed collector to take charge of the personal property of every kind of said decedent in order that the same may be properly cared for; and for such other and further relief, etc.

.....
Petitioner.

.....
Attorney.

(Venue)

I, being first duly sworn upon oath, depose and say that I have read the foregoing petition by me subscribed and know the contents thereof; that the matters and things therein stated of my own knowledge are true and that those stated on information and belief I believe to be true.

Subscribed, etc.

2180 District of Columbia, general administration

¹² The petition of respectfully represents:

1. That he is a citizen of United States of America and a resident of in the state of

2. That, late a citizen of United States of America and a resident of in the state of, departed this life on the day of, 19..

3. That said decedent left no last will and testament to the best of petitioner's knowledge, information and belief, petitioner having made diligent search and inquiry in such places and among such persons as would be likely to disclose one, if any such existed, and that said decedent died intestate, leaving no real estate but only a claim for damages against for the loss of a trunk containing articles of apparel and other personal belongings of the deceased. That the petitioner believes that the value of said personal property is not in excess of the sum of dollars.

4. That the said intestate left surviving her as her next of kin your petitioner, her father. Said decedent was unmarried.

5. That the only debts left by decedent were the funeral expenses and medical attendance, all of which had been paid by your petitioner.

6. That petitioner as next of kin of said decedent is entitled to letters of administration upon the estate of said decedent, and he therefore prays that the same may be issued to him according to law.

And your petitioner will ever pray, etc.¹³

.....
Petitioner.

.....
Attorney for petitioner.

¹² Caption as in Section 2179.

¹³ Add verification.

2181 Florida

In court of county judge, state of Florida.

Estate of

}

..... county.

To the honorable county judge of said county.

Your petitioner respectfully represents that he is a resident of the county of and state of..... That late of the county of and state of died intestate on the day of 19., leaving heirs and legal representatives h.... surviving, viz: That the said died, seized and possessed of an estate, to wit:, situate and being in That your petitioner

Your petitioner prays that ..he may be appointed administrator.. of the estate of said deceased.

.....

State of Florida, }
County of } ss.

The above named, being by me duly sworn, say.. that the foregoing (application or petition) by h.. subscribed is true.

Dated this, etc.

.....County Judge.

Recording certificate

(Venue)

Be it remembered, that on this day of, 19., I duly recorded the foregoing (application for letters of administration, or petition, or proof of will, or oath, etc., as the case may be) in the public records of said county.

.....

County Judge.

2182 Illinois

State of Illinois, }
County of } ss.

In the court of

To the term, 19..

In the matter of the appointment of administrator (or executor) of the estate of, deceased. To the honorable, judge of said court:

The petition of respectfully sheweth that is a resident of said county; that on or about

the day of, 19.,
 of, in said county, departed this
 life, leaving no last will and testament, as petitioner is informed
 and believe that said deceased left property and
 effects in this county as follows

That the value of the whole estate of said deceased does not
 exceed dollars, and that said deceased left h..
 surviving, h.. only heirs at law. That your
 petitioner reside.. at street, and (is or are)
 of said deceased, and pray.. that letters of administration may
 be granted to and all orders necessary may be
 made.

.....

(Venue)

..... being duly sworn, deposeth and says that the
 foregoing petition by subscribed, is true to the
 best of his knowledge and belief.

Subscribed, etc.

.....

2183 Maryland

| | |
|----------------------------------|--------------------------|
| In the matter of the estate of } | In the Orphans' court of |
|, } | |
| Deceased. | |

To the honorable, the judges of said court :

The petitioner,, an adult widow of,
 who died in, Maryland, on the day of,
 19., where he resided prior to his death, leaving there a large
 amount of personal property, and who left no will, hereby
 makes application for letters of administration on his estate.

And as in duty bound,¹⁴

.....
 Attorney for petitioner.

(Venue)

I hereby certify that on this day of, 19., per-
 sonally appeared before me the subscriber, a,
 widow of, deceased, and she made oath in due
 form of law, that the matters and facts herein stated, are true
 to the best of her knowledge, information and belief.

.....
 (Official character)

¹⁴ In some counties the application
 for letters is made verbally in open
 court.

2184 Michigan, general

State of Michigan.

The probate court for the county of

To the probate court of said county:

In the matter of the estate of, deceased.

I,, respectfully represent that I reside in the of, in said county, and am interested in said estate and make this petition as of said deceased.

I further represent that said deceased died on the day of, 19.., leaving no last will and testament, as I am informed and believe.

I further represent that said deceased was, at the time of h.. death, an inhabitant of the of, in said county and left estate within said county to be administered, and that the estimated value thereof is as follows: real estate, \$....., or thereabout; personal estate, \$....., or thereabout, as I am informed and believe.

I further represent that the names, relationship, ages and residences of the heirs at law of said deceased are as follows:

| Name | Relationship | Age | Residence |
|-------|--------------|-------|-----------|
| | | | |
| | | | |
| | | | |

I therefore pray that the administration of said estate be granted to, or to some other suitable person.

.....
P. O.

(Venue)

On this day of, before me personally appeared the above named petitioner,, who being duly sworn says, that ..he.. ha.. read the foregoing petition by h.. signed, and know.. the contents thereof, and that the same is true of ..h.. own knowledge, except as to the matters therein stated to be upon ..h.. information and belief, and as to those matters ..h.. believe.. it to be true.

.....
Notary Public county, Michigan.

My commission expires

| | | | | | | |
|----------|-------------------|-----------|--------------------------|-------------|----------------------|---------------|
| No. | State of Michigan | Deceased. | Petition for Appointment | Filed | Register of Probate. | Bond, \$..... |
| | Probate Court | | Administrator |, 19.. | | |
| | For the | | | | | |
| | County of | Estate of | | | | |

2185 Michigan, special

State of Michigan.

The probate court for the county of

To the probate court for said county:

In the matter of the estate of

I,, respectfully represent that I reside in the of in said county and am interested in said estate and make this petition as

I further represent that a petition has been made to said court for the appointment of a general of said estate, which petition is now pending; that such appointment will be delayed on account of the length of notice thereof, required by law to be given to all persons interested; that there is estate belonging to said, situated and being in said county and elsewhere, to be administered, and that the estimated value thereof is as follows: real estate, \$....., or thereabout; personal estate, \$....., or thereabout, as I am informed and believe.

I further represent that it is necessary that a special of said estate be appointed to collect, take charge of, preserve and manage the same, for the following reasons:

I therefore pray that or some other suitable person be appointed special of said estate.

.....
P. O.¹⁵

2186 Mississippi

State of Mississippi, }
..... county. } ss.

In the chancery court of said county.

Petition of

In the matter of the estate of, deceased, for

¹⁵ Attach verification as in preceding form.

To the honorable, chancellor of the chancery court
of the county of, in the state of Mississippi:

The petition of the undersigned,, respectfully
represents that, late of the county of
aforesaid, deceased, departed this life at, in said
county, on or about the day of, 19.., having no
last will and testament so far as your petitioner.. know.. or
believe.. And this petition further shows that the said
. died seized and possessed of real and personal
estate, consisting chiefly of All of said per-
sonal estate being estimated to be worth about dol-
lars. That said deceased left surviving him,
his widow, and, his children, as his heirs; that
your petitioner.. (being of said deceased,) and believing that said estate should be immediately admin-
istered, as well for the proper management of said
as for the prompt collection of the assets.

By virtue of right under the statute
therefore pray.. that your honor will grant letters of adminis-
tration to in the premises upon taking
the oath prescribed by the statute, and entering into bond in
such sum and with such securities as may be approved by your
honor, and that your honor will appoint appraisers to value
and appraise the goods, chattels and personal estate of said
intestate, and make such orders as to your honor may seem
meet and proper in the premises.

Sworn, etc.

| | |
|---|---|
| <p>File No.</p> <hr/> <p>Petition of for Letters of Administra- tion.</p> <hr/> <p>Estate of</p> <p>Deceased.</p> <hr/> <p>Filed, etc.</p> | <p>Ordered that letters of administration be granted to petitioner on entering into bond in the sum of dollars with and as sureties. Appraisers. Term, 19..</p> |
|---|---|

2187 Virginia

The appointment of an administrator may be obtained upon
oral or written application.

2188 West Virginia, nomination

To the honorable, the county court of county, West Virginia:

The undersigned petitioner, of, respectfully represents unto the said county court that, a resident and citizen of the county of, departed this life on the day of, 19.., intestate, as it is advised and informed.

Petitioner says that it is a creditor of the estate of said for a large sum of money, evidenced by notes and other obligations in its hands, and that it is interested in the appointment of a proper person as administrator of the estate aforesaid, and now here nominates and moves the said court for the appointment of, of said county, as such administrator, and prays that letters of administration in the premises be granted to said

.....

.....,

Counsel for said

b

To the county court of county:

The petition of and, next of kin acting for and in behalf of themselves and as representative in behalf of all the other next of kin of, filed in the clerk's office of said county court.

Petitioners say that the said is the sole heir of, deceased, that she is suffering from senile dementia and that from this and other infirmities of age is wholly incapable of administering on said estate or of nominating any one to administer on it for her and in her stead; that petitioners have applied to the circuit court of said county to appoint a committee for her to take charge of and manage her estate for her benefit and that the duty rests upon these petitioners and those they represent, as the next of kin and prospective heirs of said, to nominate an administrator to take charge of and administer said estate.

Petitioners are advised that, sheriff of this county, and at the present time acting as curator of said estate, is the most proper and suitable person to complete the administration of said estate.

Petitioners therefore pray that the clerk of said court or the said court appoint the said the administrator of said estate. And they will ever pray, etc.

Dated, etc.

.....
For and in behalf of themselves and all other next of kin of

By counsel.

.....,
Attorneys.

2189 West Virginia, petition

To the honorable the county court of county:

Petitioner,, respectfully represents that, a resident of the city of, county, West Virginia, departed this life on the day of, 19.., at the said city of, intestate, unmarried, leaving as his sole heir at law and distributee his sister,, a resident of township, county,, who, by an order of the probate court of said county, was, on the day of, 19.., adjudged an imbecile and incapable of caring for and preserving her property.

Petitioner further represents that he is a creditor of said, and therefore asks that administration of the estate of the said decedent be granted to him.

.....

TESTAMENTARY

2190 District of Columbia; personal property, letters alone

¹⁶ The petition of respectfully represents:

1. That he is a citizen of the United States of America and a resident of the city of, District of Columbia.

2. That, late a citizen of the United States of America, and a resident of the said city and district, departed this life at, on or about the day of, 19..

3. That the said decedent left a last will and testament bearing date the day of, which is herewith presented for probate.

4. That said decedent died without ever having been married and left him surviving as his only heirs at law and next of kin, his brothers and sisters whose names and residences are as follows (State names and addresses of each), and your petitioner,, All of the aforesaid brothers and sisters of the said decedent are of age, and there are no children of any deceased brother and sister.

¹⁶ Caption and verification as in Section 2179.

5. Said testator died seized and possessed of only personal effects such as clothing (Describe same), estimated to be worth about dollars, and notes herein (Describe same) secured by deed of trust on property, the security of which, however, is very doubtful. The original note of said was lost by said decedent, but he procured a copy of the same during his lifetime, which copy your petitioner now has; another note (Describe and state the material facts concerning same).

6. The said decedent left no debts except about dollars due to your petitioner, and his funeral expenses, which, including the embalming and cost of transporting the body from to this city, amount to about dollars.

7. Your petitioner is the executor named in said will and as such believes himself entitled to letters testamentary on said estate.

Wherefore, he prays that said will may be admitted to probate and record and letters testamentary granted him accordingly.

.....

.....,

Attorney for petitioner.

Waiver of citation

(Caption)

The undersigned, next of kin of, deceased, being acquainted with the contents of his will, dated, and of the appointment therein of as his executor, hereby waive citation or publication of advertisement., and consent that the court may probate the said will and appoint the said as executor without further notice to us.

Dated, etc.

Brother of, deceased.

2191 District of Columbia; personal property, letters and guardian

¹⁶ Your petitioner,, respectfully shows unto the court as follows:

That it is a citizen (or that it is a corporation organized, etc.)

That, late a citizen of the United States of America and resident in the city of, District of Columbia, departed this life on or about the day of in the said city and district.

That said decedent died possessed of no real estate in the District of Columbia, but was possessed of the following personal property: (Describe the same and state amount); that said de-

¹⁶ Caption and verification as in Section 2179.

cedent died possessed of no other property of which your petitioner is aware save and except an interest in the estate of, it being a contingent interest in said estate.

That the debts due, and payable by said decedent, including the expenses of her last illness and funeral do not exceed the sum of dollars.

That decedent left a last will and testament which bears date day of, 19.., wherein and whereby she appointed as executor.

That decedent left her surviving as her heirs at law and next of kin her brother,, a resident of, her half sister,, and a half brother,, both of whom are residents of the city of, District of Columbia. That said and are infants under the age of twenty-one years of whom a guardian *ad litem* should be appointed.

Your petitioner is advised by counsel and believes and hence avers that as the executor named under said will he is entitled to have letters testamentary granted to him.

Wherefore, your petitioner prays that the said last will and testament be admitted to probate and record as a last will of personal property, that letters testamentary on said estate do issue to him, and that a guardian *ad litem* be appointed for said infants.

And your petitioner will ever pray.

.....

2192 District of Columbia; real and personal property

¹⁶ (Introduction and citizenship of petitioner and decedent the same as in Section 2190.)

3. That the said, deceased, left him surviving at the time of his death as heirs at law and next of kin, the persons whose names, relationship and residences are as follows: your petitioner,, widow, residing at street,;, son, residing at, and, son, residing at, the said being an infant within the age of twenty-one years and being of the age of years, having been born on

4. That the said, deceased, died possessed of personal property consisting of household furniture and effects located at his last place of residence and abode, to wit, street, being of the value of not more than dollars; also the proceeds of a certain policy of insurance held by the said decedent in, in the sum of dollars, subject to the curtailment on account of the loan made by decedent of dollars, the net amount resulting from

¹⁶ Caption and verification as in Section 2179.

said policy of insurance being not more than dollars; the total value of said personal estate, therefore, being not more than dollars.

5. That the said decedent,, died seized and possessed of the real estate in the District of Columbia consisting of the premises known as lot (Give legal description), improved by, the said lot and premises being of the value of about dollars; and also lot (Describe as above).

6. That said died testate leaving a last will and testament, bearing date the day of, which is herewith presented for probate and record as the last will and testament as to real and personal property.

7. That the said decedent left a few small debts, not exceeding the sum of dollars.

8. That in and by the said last will and testament of the said, deceased, your petitioner,, is named as executrix thereof, reference being had to the said last will and testament herewith filed and prayed to be read as a part hereof; by reason of which petitioner believes herself entitled to letters testamentary thereunder.

Wherefore, the premises being considered, your petitioner prays that the said will and testament may be admitted to probate and record as a will and testament of both real and personal property and that letters testamentary may issue and be granted to her thereunder. That this honorable court may appoint some suitable person or persons guardian or guardians *ad litem* for the infant heirs and next of kin. And that your petitioner may have such other and further relief as the nature of her case may require.

.....
,
 Attorney for petitioner.

Waiver of citation

(Caption)

I,, one of the heirs at law and next of kin of, late of the city of, District of Columbia, being familiar with the contents of the last will and testament of the said, executed, do hereby waive citation and consent that said last will and testament be admitted to probate and record by the probate court of the District of Columbia as a will of real and personal property, and that letters testamentary be issued to, the executor therein named.

.....

2193 Florida

¹⁷ To the honorable, judge of said court:

The petition of respectfully sheweth that he is a resident of county, state of; that on the day of, 19.., of, in said county, departed this life at, leaving a last will and testament, duly signed and attested, as your petitioner believes, which he now presents to your honor for probate; that said testator in said will nominated your petitioner,, executor thereof; that said deceased left property and effects as follows: That said deceased left him surviving, his only heirs at law; that your petitioner resides at and willing to accept and undertake the trust confided to in said will.

Wherefore, your petitioner prays that the said will may be admitted to probate, and letters testamentary thereon may be issued to after proper hearing and proof; and that all other orders necessary may be made.

2194 Illinois

¹⁸ The petition of respectfully sheweth that he is a resident of the state of Illinois; that on the day of, a resident of, departed this life at, leaving a last will and testament, duly signed and attested, as your petitioner believes, which ..he.. now present.. to your honor for probate. That said testa... in said will nominated your petitioner,, execut..... thereof. That said deceased left property and effects as follows: Personal estate not to exceed in value dollars; real estate not to exceed in value dollars; real estate registered under Torrens act not to exceed in value dollars. That the value of the whole estate of said deceased does not exceed dollars. That said deceased left ..h.. surviving:

| Name | Relationship | Residence at time of death of said deceased | Present residence, or that residence is unknown |
|-------|--------------|---|---|
| | | | |
| | | | |

h.. only heirs at law and next of kin. That the names and residences of the legatees and devisees under the will of said deceased are as follows:

| | |
|-------|-------|
| | |
|-------|-------|

¹⁷ Caption, verification and recording certificate as in Section 2181.

¹⁸ Caption and verification as in Section 2182.

That your petitioner.. reside.. at street, and is willing to accept and undertake the trust confided to him by said will.

Wherefore, your petitioner prays that said will may be admitted to probate, that letters testamentary thereon may be issued to him, after proper hearing and proof; and that the hearing on said petition may be set for the day of, at .. o'clock .. M., or as soon thereafter as the matter can be heard; and that all other orders necessary may be made.

.....
Petitioner.

2195 Maryland

¹⁹ The application of of, late of county, deceased, respectfully represents that died .. testate on the .. day of, 19.., leaving personal property to the amount of \$....., a.....; and the following named children:, born, 19..

Your applicant is advised that letters should be granted and distribution made among the personal representatives and creditors of said deceased.

Wherefore, prays that letters may be granted to

.....

| | | | | | | | | | |
|----------------|-------|-------|-------|--------------------|------------------------|-------------------------|-------|-------|-------|
| Application of | | | | Filed | Approved by court this | day of 19.. | C. J. | A. J. | A. J. |
| | | | | day of | | | | | |
| | | | | 19.. | | | | | |

2196 Michigan

²⁰ I,, respectfully represent that I reside in the township of, in said county, and am interested in said estate and make this petition as widow of said deceased.

I further represent that said deceased departed this life on the day of, 19.., leaving a last will and testa-

¹⁹ Caption and verification as in Section 2183. ²⁰ Caption and verification as in Section 2184.

ment, as I am informed and verily believe, which is filed herewith for probate.

I further represent that said deceased was, at the time of his death, an inhabitant of the township of, in said county, and left estate within said county to be administered and that the estimated value thereof is as follows: Real estate, \$., or thereabouts; personal estate, \$., or thereabouts, as I am informed and verily believe.

I further represent that the names, relationship, ages and residences of the heirs at law of said deceased are as follows:

., widow, .. years,, township, county;

., brother, .. years,, township, county.

That was nominated as executor of said last will and testament.

I therefore pray that said will may be admitted to probate, and that the administration of said estate may be granted to the executor therein named, or some other suitable person.

her

.

mark

P. O. township, county, Michigan.

2197 Mississippi

²¹ The petition of, of said county, respectfully represents that on the day of, 19..,, late of said county, departed this life, leaving a last will and testament duly signed, published and attested, as your petitioner believes, and which in pursuance of statute, herewith presents to be probated.

The said will is subscribed by and as witnesses to the signature and publication thereof, both of whom reside in said county and district.

The affidavit of said witnesses is presented in conformity to the statute, and your petitioner prays that probate of said will may hereupon be granted, and the same ordered for record.

And your petitioner, as in duty bound will ever pray, etc.

Sworn to and subscribed before, this the day of, 19..

²¹ Caption as in Section 2186.

| | | | | |
|----------|--------------------|----------|----------|------------------------------|
| No. | Will and estate of | Deceased | Executor | Petition for probate of will |
|----------|--------------------|----------|----------|------------------------------|

NOTICE AND PUBLICATION

2198 Notice, necessity

The failure to give notice to known heirs will defeat the jurisdiction of the court to enter judgment of probate, notwithstanding the knowledge of such heirs that the court acted or would act without jurisdiction.²²

2199 Order for publication (D. C.)

(Caption)

Application having been made herein for letters of administration upon the estate of said by, it is ordered this day of, 19.., that the unknown heirs, next of kin, and husband, if any, of said decedent, and all others concerned, appear in said court on day of, 19.., at o'clock to show cause why such application should not be granted. Let notice hereof be published in and once in each of three successive weeks before the return day herein mentioned, the first publication to be not less than thirty days before said return day.

By the court:

.....
Justice.

b

(Caption)

Application having been made herein for probate of the last will and testament and of said deceased, and for letters on said estate, by, it is ordered this day of, 19.., that and all

²² Floto v. Floto, 213 Ill. 438, 442 (1905).

others concerned, appear in said court on, the day of, 19.., at o'clock .. M., to show cause why such application should not be granted. Let notice hereof be published in the and once in each of three successive weeks before the return day herein mentioned—the first publication to be not less than thirty days before said return day.

....., Justice.

Attest:

.....,

Register of Wills of the District of Columbia.

....., Attorney.

c

(Caption)

The notification as to the trial of the issues in this case relating to the validity of the paper writing, dated the day of, 19.., and the day of, 19.., purporting to be the last will and testament and codicil of, deceased, having been returned as to “not to be found,” it is this day of, 19.., ordered that the issues be set down for trial on the day of, 19.., and that this order and the substance of said issues, to wit, shall be published once a week for four weeks in the and twice a week for the same period in

....., Justice.

Attest:,

Register of Wills for the District of Columbia.

....., Attorney.

Illinois

(Caption)

This day comes and produces in open court an instrument in writing purporting to be the last will and testament of, deceased, and presents and files therewith ..h.. petition, duly verified, praying that said instrument might be admitted to probate and that letters testamentary might be issued thereon. And upon reading and filing said petition, it is ordered by the court that the hearing on said petition or application be set for the day of, 19.., at o'clock in thenoon, and that notice of such hearing be given as is by statute required.

Michigan**State of Michigan,**

The probate court for the county of

At a session of said court, held at the probate office in the city of, in said county, on the day of, 19..

Present: honorable, judge of probate.
In the matter of the estate of, deceased.

..... having filed in said court petition praying that the administration of said estate be granted to or to some other suitable person.

It is ordered, that the day of, 19.., at ten o'clock in the forenoon, at said probate office, be and is hereby appointed for hearing said petition.

It is further ordered, that public notice thereof be given by publication of a copy of this order, for three successive weeks previous to said day of hearing, in the, a newspaper printed and circulated in said county.

....., Judge of Probate.

2200 Notice or citation (D. C.)

The president of the United States, to, greeting:

If you have any cause to show why the paper writing dated the day of, 19.., and the day of, 19.., purporting to be the last will and testament and codicil of, late of the District of Columbia, deceased, should not be admitted to probate and record, and why letters should not be granted to, the, you will appear and make such cause known before the supreme court of the District of Columbia, holding probate court, in and for said District, on, the day of, 19.., at .. o'clock, .. M.

Witness, the honorable, chief justice of said court, this day of, 19..

Attest:,

Register of Wills for the District of Columbia.

....., Attorney.

b

(Caption)

To

You are hereby notified that the issues heretofore framed in this cause relating to the validity of the paper writing, dated the day of, 19.., and the day of, 19.., purporting to be the last will and testament and codicil

of, deceased, will be tried in this court on the
.... day of, at o'clock .. M. A copy of said
issues is hereto appended.

.....
Justice.

Attest, etc.

Illinois

(Caption)

To all persons whom this may concern, greeting:

You are hereby notified that on the day of,
19.., an instrument in writing purporting to be the last will
and testament of, deceased, was filed in the pro-
bate court of county, Illinois; also on the same date
was filed a petition, asking that the said instrument in writing
be admitted to probate as and for the last will and testament
of, deceased.

Such petition states that the following persons are all the
known heirs at law, legatees and devisees of the said deceased,
to wit:

That the other heirs at law, if any, of said deceased, are un-
known to said petitioner.

You are further notified that the hearing of the proof of the
said last will and testament has been set by said court for the
.... day of, 19.., at the hour of .. o'clock in the
forenoon, at the court house in, Illinois, said county
and said state, when and where you may appear, and show
cause, if any you have, why said instrument in writing should
not be admitted to probate as the last will and testament of
said, deceased.

.....
Clerk of the probate court.

Dated, etc.

2201 Service, proof, affidavit (Mich.)

(Caption)

..... being duly sworn, says that he served upon
..... a copy of the order, of which the foregoing and
annexed is a true copy, on the day of, 19.., at
..... of, in said county, by delivering the same
to personally.

Subscribed, etc.

2202 Service, proof; failure to mail, affidavit (D. C.)

(Venue)

I,, on oath say that I am attorney in the above cause for, who has been appointed collector, and who has made application for letters of administration on the estate of the above named; that I have made diligent search to ascertain the unknown heirs, the unknown next of kin, and the unknown husband, if any, of the above named decedent in order to mail to them or any of them a copy of the order of publication in the above cause, but have been unable to obtain the names, or any information in respect of any such persons, or any definite information that there are any such persons.

Subscribed, etc.

GUARDIAN AD LITEM

2203 Appointment

Upon motion of petitioner, and it appearing to the court that the heir at law and next of kin is an infant within the age of twenty-one years, being born the day of, 19.., and being here in court and having selected as his guardian *ad litem*, it is this day of, 19.., ordered that the said be and he hereby is appointed guardian *ad litem* for the infant heir at law and next of kin to appear for, answer and defend his several interests herein.

By the court,

Associate Justice.

2204 Answer

The answer of, guardian *ad litem* of the infant heir and next of kin to the petition of, filed herein praying the probate of the will of, decedent and the grant to her of letters testamentary thereunder.

Neither admitting nor denying the allegations set forth in said petition he submits the interests of the said infant heir at law and next of kin to the consideration and protection of the court, and hereby consents and requests that the petition of said be acted upon, that the said will be probated and that letters testamentary issue to her as therein prayed.

Guardian *ad litem*.

Attorney for guardian *ad litem*.

(Verification)

PROTEST AND OPPOSITION

2205 Devisee, petition (Ill.)

To the honorable, judge of said court:

Your petitioner,, respectfully represents and shows unto your honor that on or about the . . . day of, 19. . ., one departed this life testate at in said county and state; that your petitioner is the daughter and one of the devisees under the will of the said and is, therefore, interested in the settlement of her said estate; that one induced the said to make said will; that the same is in his handwriting and that he caused himself to be nominated the sole executor of said will contrary to the wishes of all of the children and heirs of the said; that in and by said will he is appointed sole executor without bond which was done without the knowledge or consent of the heirs of the said

Your petitioner further represents that said will is null and void because the same is not attested by credible witnesses as **is by the statute** in such case made and provided; and further, because the same is not under seal.

Your petitioner further represents unto your honor that in and by his petition asking for the probate of said will the said has not given the names of all of the heirs at law of the said as is by the statute in such case made and provided; that the said in and by her said will provided, among other things, as follows (Insert provision). That your petitioner had the following named children now living which under the provisions of the said will may have some interest in the estate of the testatrix, to wit: (Name the children and give their addresses). That the said is the only one of said children of your petitioner who has received any notice of the probate of this will.

Your petitioner further represents that at the time of her death the testatrix was the owner of personal property estimated to be worth about the sum of dollars which consisted of money in bank and household and kitchen furniture; that she was also the owner of real estate situated in the city of in said county and state estimated to be worth about the sum of dollars.

Your petitioner further represents that she has reason to believe, and does believe, that if said personal property and money should go into the hands of the said without bond that the heirs and legatees and devisees under said will would be endangered in the collection of their interests in said estate; and that if bond is not required of the executor named in said will that the lawful heirs of said estate would be jeopardized in the collection of their interests in said estate.

Your petitioner further represents that all the persons inter-

ested in said estate are opposed to the appointment by this court of said as executor of said will; and that he procured his own appointment for the sole purpose of receiving and collecting a commission for executing said will.

Wherefore, your petitioner prays that the said shall not be appointed executor of said will and that in no event shall he be so appointed without bond; and your petitioner further prays for such other and further relief in the premises as equity may require and to your honor shall seem meet.

(Verification)

2206 Next of kin, protest (W. Va.)

To the county court of county and, clerk thereof:

The protestation and objections of being of next of kin of, deceased, and, lunatic, and on behalf of themselves and acting for and in behalf of and as representatives of all of the next of kin of said, deceased, and of, lunatic, against the appointment of and as administrators of said estate and as committee of said, lunatic.

Protestants object to the appointment of said as administrator for good legal reasons, to wit: (State reasons).

Protestants therefore unanimously and earnestly insist that the court appoint, sheriff of this county and present curator thereof, to complete the administration of said estate, that the attempted illegal exploitation of said estate may be put to an end, that the scandals regarding thereto may cease, that protestants' legal rights and status may be preserved and that said estate may be truly administered in accordance with law and preserved for the benefit of those legally entitled thereto. And they will ever pray, etc.

..... For and in behalf
of the next of kin of,
deceased, and,
lunatic, by counsel.

.....,
Attorneys.

2207 Sole heir or distributee, protest and application (W. Va.)

To the honorable county court, county, West Virginia.

The protest of, who respectfully represents that she is a resident and citizen of county,, and that she is the only sister and sole distributee of the estate

of the late of county, West Virginia, who departed this life in said county on the day of, 19., intestate, unmarried and without issue, and that he left neither parents, brothers nor sisters surviving him except your protestant who is the only sister and sole distributee of said, deceased, as above stated.

Your protestant insists that under the provisions of the statute of the state of West Virginia in such cases made and provided that she has the sole right to administer and be appointed and qualify as the administratrix of the personal estate of said which is ascertained to be largely if not entirely in said county of and state of West Virginia; or that in lieu thereof she has the sole right to nominate and name the administrator of said estate to act in her person and stead.

Your protestant further represents that acting under the right given her by the said statute of the state of West Virginia she did, on the day of, 19., being in full possession of her mental capacities, apply to the clerk of the county court of county, West Virginia, for the appointment of and as administrators of the said estate of, deceased; and it appearing that the said has since, in writing, waived his right to act as such administrator jointly with the said, your protestant insists that she has a right to name and have appointed the said as the sole administrator of said estate.

Your protestant further urges and protests against the appointment of any other person or persons to act as such administrator or administrators of said personal estate of the said, deceased, other than the said, for whose appointment your protestant has applied as under the statute of the said state of West Virginia she is advised she has the right to do. Your protestant is informed and believes and therefore charges that application has been made to your honorable court for the appointment of persons other than said as such administrator of said estate, and the said now here protests against the appointment of any person or persons as such administrator or administrators other than the said who has been so named and designated by her to administer said estate.

Your protestant therefore prays that the said may be appointed by your honorable court to administer the personal estate of the said, deceased, and of which estate your protestant is the sole beneficiary; and as in duty bound your protestant will ever pray, etc.

.....
By counsel.

.....
Attorney for

Affidavit

(Venue)

..... of, county,, this day made the following statement under oath, before the undersigned notary public for the aforesaid county: I am a sister of, deceased, who departed this life on the day of, 19.., at, in the county of, West Virginia; that I and said were both children of, now deceased; I am sure that I am the only and sole heir at law of said, said having no other sister or brother or heir of either sister or brother at the date of his death.

her

.....

mark

Subscribed, etc.

Witnesses:

.....

b

To the honorable county court county, West Virginia:

The protest of of county, West Virginia, respectfully represents that on the day of, 19.., one of county, West Virginia, departed this life in said county, intestate, unmarried and without issue, leaving surviving him an only sister and sole distributee of said estate, one, of, county, state of; that by a paper writing duly executed, witnessed and acknowledged by the said dated on the day of, 19.., she as such sole distributee of said estate applied to the clerk of the county court of county, West Virginia, for the appointment of and your protestant,, as administrators of the personal estate of said deceased; that said application was presented to and admitted to record by the clerk of said county court of county, West Virginia, in his office on the day of, 19..; that the said has since waived his right, in writing, to act as such administrator jointly with your protestant, which said waiver is filed with petition of your protestant in your honorable court asking the appointment of your protestant,, as such administrator of said personal estate of said; and that the said

insists upon the appointment of your protestant as the sole administrator of said estate.

Your protestant therefore protests against the appointment of any person or persons other than himself as such administrator or administrators of the personal estate of, deceased, and insists that the said as the sole distributee of the said has the sole right to designate and have appointed the administrator of said estate, and your protestant therefore prays that he may be appointed to administer the estate of the said deceased in accordance with the written desire and demand of the said And as duty bound he will ever pray, etc.

.....
By counsel.

.....
Attorney for

Power of attorney in fact and waiver

Know all men by these presents, that I,, do hereby make, constitute, and appoint and my true and lawful attorneys in fact, for me and in my name, and to my use to demand, sue for, recover and receive of all persons owing to the estate of, deceased, and every such sum or sums of money, debts, or demands whatsoever as are now due and owing unto me as one of the heirs at law of, deceased; and in default of payment thereof to have, use, and take all lawful ways and means, in my name or otherwise for the recovery thereof, by action, suit or in any manner of legal process, or otherwise; and to compound and agree for the same. And on receipt thereof to make and deliver to me, and in my name, acquittances or other sufficient discharges for the same; and to do all lawful acts and things whatsoever concerning the premises, as fully in every respect as I myself might or could do if I were personally present; and any attorney or attorneys under them, for the purpose aforesaid, to make; hereby ratifying, allowing and confirming all and whatsoever my said attorneys shall in my name lawfully do or cause to be done in and about the premises by virtue of these presents.

And I as a and heir at law of the said, deceased, hereby waive my right to administer upon his said estate, and do further hereby direct the clerk of the county court of county, West Virginia, to appoint the said and as the administrators of the estate of the said, deceased.

Given under my hand and seal at, in the
county of, state of, this
day of, 19..

her
..... (SEAL)
mark

Witnesses:

.....
.....
.....

(Venue)

I,, a notary public of the county aforesaid, do
certify that, whose name is signed to the writing
above bearing date on the day of, 19..,
has this day acknowledged the same before me in my said
county.

Given under my hand and official seal, this.....
day of, 19..

.....
Notary Public.

West Virginia:

Be it remembered, at o'clock a. m. on the
day of, 19.., the foregoing power of attorney
and certificate were admitted to record in the office of the clerk
of the county court of county.

Test:, Clerk.

PROBATING WILL

2208 Law and fact

The question of the probate of a will is for the court and not
the jury.²³

2209 Attestation, witnesses, clause

A will is valid and entitled to probate although it has no
formal attestation clause that the witnesses signed in the pres-
ence of each other and in the presence of the testator at his
request.²⁴ A will is attested in the presence of a testator if it
is signed at a place within the scope of his vision and he is in a
position and in a condition of health to see the signing if he so
chooses. It is not essential that the testator should actually see

²³ Schofield v. Thomas, 231 Ill. 114 (1907). ²⁴ 271 (1904); Mead v. Church Trustees, 229 Ill. 526, 530 (1907).

²⁴ More v. More, 211 Ill. 268,

the witnesses sign his will.²⁵ No actual request of the subscribing witnesses is necessary to constitute a valid attestation of a will. The request is sufficient if the testator makes known his desire through another that the witnesses shall sign his will as witnesses. An invitation given or an expression of a desire made by another on behalf of the testator, in his presence, and assented to by him, is equivalent to his own invitation or expression.²⁶

Prior to May, 1911, in Illinois the wife of a person who was nominated as executor was incompetent to witness a will, where there was only one other witness thereto, and this incompetency could not be obviated by subsequent renunciation of the executorship. This rule governs all estates which have become vested by the death of the testator before the amendatory act of May, 1911, took effect, notwithstanding the statutory provision that the act shall apply to cases which arose, but which were not finally decided, prior to the adoption of the amendment.²⁷

2210 Mutual capacity, inquest of lunacy

Upon an application for admission of a will to probate, the only evidence which is competent as to the mental capacity of the testator is that of the subscribing witnesses. No other evidence is required and no contradictory evidence is admissible, though the Illinois statute reserves the right to show fraud, compulsion or other improper conduct sufficient to invalidate the will.²⁸ A less degree of mental capacity is required for the execution of a will than for the execution of contracts and the transaction of ordinary business. It is sufficient for the making of a will that the testator understands the business in which he is engaged, his property, the natural objects of his bounty and the disposition he desires to make of his property, while mental strength to compete with an antagonist and an understanding to protect his own interest are essential in the transaction of ordinary business and making of contracts.²⁹ An inquest of lunacy is conclusive as to subsequent occurrences only when made so by

²⁵ *Ellis v. Flannigan*, 253 Ill. 397, 400 (1912).

²⁶ *Craig v. Trotter*, 252 Ill. 231.

²⁷ *Rowlett v. Moore*, 252 Ill. 436, 439 (1911); Sec. 8, Wills act as amended in 1911.

²⁸ *In re Weedman's Estate*, 254 Ill. 504, 506 (1912).

²⁹ *In re Weedman's Estate*, 254 Ill. 508.

statute, as in the case of contracts. An inquest is not conclusive as to wills.³⁰

2211 Physical inability

The physical inability, as distinguished from the testamentary capacity of the testator, may be shown upon an application for the probate of a will, under a claim that the testator had never executed the will.³¹

2212 Testator's signature, comparison

The genuineness of a signature cannot be proved or disproved by a comparison of handwritings, unless there are already in the case other writings or signatures which are admitted to be genuine.³²

2213 Florida

In court of the county judge, state of Florida.

Estate of

..... } county.
..... }

Personally appeared before me, county judge for the county aforesaid,, one of the subscribing witnesses to the foregoing paper writing, who, being duly sworn, declares and says that did, in presence, sign, seal and publish the foregoing paper writing as and for his last will and testament; and that, the said witness, signed the same as a subscribing witness, at the special request of said testator; and that the said testator signed said paper writing in the presence of, and this affiant, who likewise signed said paper writing, as subscribing witnesses, in the presence and at the request of the testator, and also in the presence of this affiant; and that verily believes said paper writing to be the true last will and testament of said testator.

Sworn to and subscribed before me this day of
....., 19..

.....
County Judge.³³

³⁰ In re Weedman's Estate, *supra*; Sec. 14, c. 86, Rev. Stat.

³¹ Craig v. Trotter, 252 Ill. 231; Stuke v. Glaser, 223 Ill. 316 (1906) limited.

³² Craig v. Trotter, 252 Ill. 233.

³³ Add recording certificate as in Section 2181.

| | | | | |
|--|--------------------|-------------------|---|------------------------|
| In County Judge's Court county, Florida. | Estate of | Proof by | Filed 19.. and recorded in book... page ... | County Judge. |
|--|--------------------|-------------------|---|------------------------|

2214 Illinois, dedimus

State of Illinois, }
County of } ss.

The people of the state of Illinois,

To

Whereas, it has been represented to us that
the subscribing witness.. to the last will and testament of
....., late of the county of, the probate
of which will is now pending before our court
and that the said witness.. reside at aforesaid
without the said state of Illinois, and that per-
sonal attendance cannot be procured at the hearing of said
cause; now, know ye, that we, in confidence of your prudence
and fidelity, have appointed you commissioner to examine the
said witness.., and do therefore authorize and require you to
cause the said witness.. to come before you at such time and
place as you may therefor designate and appoint, and diligently
to examine the said witness.. on the oath or affirmation of the
said witness.. by you first duly, in that behalf, administered,
and faithfully to take the deposition of the said witness.., upon
all interrogatories enclosed with or attached to these presents
and none others; and the same, when thus taken, together with
this commission and the said interrogatories, to certify into our
said court of county with the least
possible delay.

Witness, etc.

2215 Illinois, interrogatories

Testimony taken in the probate court of county,
judge presiding, on, 19.., in
the matter of proof of the last will and testament in the above
named estate, witnessed by and

(Name of witness) being first duly sworn, testified in open court as follows:

1. Name, age, residence and occupation?

2. Look at this instrument now shown you purporting to be the last will and testament of and state whether or not your name and signature appears thereon?

3. At whose request did you sign your name to this instrument?

4. For what purpose did you sign it?

5. Did you see deceased sign name to this instrument?

6. Did deceased see you sign your name to this instrument?

7. Who were present at the time deceased signed name to this instrument?

8. What was the condition of the mind and memory of deceased at the time signed his name to this instrument?

9. Do you believe that at the time deceased signed name to this instrument was of sound and disposing mind and memory?

10. How old was deceased at the time he signed name to this instrument?

11. What date was it that deceased and the witnesses signed their names to this instrument?

12. Whereabouts?

13. Was there any fraud or undue influence used to secure the signature of deceased to this instrument?

14. Did contract any marriage after he signed name to this instrument?

Stenographer's certificate

(Venue)

....., being first duly sworn on oath says that the foregoing testimony was duly taken and reported by in shorthand on and that the above is a true and faithful transcript of the same, as very believes.

Subscribed, etc.

2216 Maryland, custodian's affidavit

³⁴ (Venue)

On the day of, 19.., came and made oath in due form of law, that he does not know of any will or codicil of, late of said city, deceased, other than the above instrument of writing, and that he procured the within will from the vault of the.....

³⁴ Attach will.

company, and retained its custody; and that testatrix died on the day of, 19..

Sworn to in open court.

.....

Test: Register of Wills for.....

2217 Maryland, subscriber's affidavit

(Venue)

On the day of, 19.., came and the two subscribing witnesses to the foregoing last will and testament of, late of said city, deceased, and made oath in due form of law, that they did see testatrix sign and seal this will; that they heard her publish, pronounce and declare the same to be her last will and testament; that at the time of her so doing she was to the best of their apprehension, of sound and disposing mind, memory, understanding, and that they subscribed their names as witnesses to this will in her presence at her request, and in the presence of each other.

Sworn to in open court.

Test: Register of Wills for

2218 Mississippi

State of Mississippi, } ss. Chancery court,
..... County.}, 19..

In the matter of a certain instrument of writing, purporting to be the last will and testament of, deceased, of county.

Be it remembered, that at a regular term of the chancery court of said county and state aforesaid, begun and held at the court house thereof, on the day of, 19.., personally appeared in open court and and subscribing witnesses to a certain instrument of writing, purporting to be the last will and testament of, deceased, late of county, who, having first been duly sworn, deposed and said that the said signed, published and declared said instrument as his last will and testament on the day of, 19.., the day of the date of said instrument, in the presence of the deponents, and that the said testator was then of sound disposing mind and memory, and over twenty-one years of age, and that these deponents subscribed and attested said instrument, as witnesses to the signature and publication thereof at the special instance and in the

presence of the said testator, and in the presence of each other, on the day and year of the date thereof.

.....

Sworn to and subscribed in open court, on this, the
 day of, 19..

.....

Clerk.

ORDERS, ADMINISTRATION

2219 District of Columbia, to collect

Upon consideration of the petition of heretofore filed in this cause for the appointment of a collector upon said estate pending administration, it appearing to the court from said petition that there is no person to care for the property of the decedent pending administration and at this time there being no known next of kin, it is by the court this day of, 19.., ordered that be and he is hereby appointed collector of said estate upon his giving bond in the penalty of dollars for the faithful performance of said trust.

By the court,

....., Justice.

2220 District of Columbia, general

Upon consideration of the petition of for letters of administration upon the estate of the above named, and it appearing to the satisfaction of the court that said died intestate, on or about the day of, 19.., in the District of Columbia; and it further appearing that due order of publication has been made and published herein against the unknown next of kin, the unknown heirs at law and the unknown husband, if any, of said, and that the rules of court in respect of such publication have been complied with, and no cause to the contrary being shown, it is by the court this day of, 19.., ordered, adjudged and decreed that letters of administration upon the estate of the said be and the same hereby are granted unto upon his giving bond in the penalty of dollars, conditioned for the faithful discharge and performance of the duties imposed upon him by virtue of the said trust.

By the court,

....., Justice.

b

Upon consideration of the petition of for letters of administration upon the estate of, deceased, it is this day of ordered that the said be and he hereby is appointed administrator of the estate of, deceased, upon his giving bond in the penal sum of dollars, conditioned for the faithful performance of his duties.

By the court,

....., Justice.

2221 Florida

By the judge of said court:

On application of for letters of administration on the estate of, deceased, intestate, late of said county, it appearing to the court that

It is ordered, adjudged and decreed, that said be and hereby appointed administrat.... of the estate of said, deceased, and that upon taking the prescribed oath, and entering into bond to be approved by this court in the sum of dollars, letters of administration on the estate aforesaid be granted to said applicant.

Given under my hand and seal, this day of, 19..

.....
County Judge.

2222 Michigan, special

State of Michigan.

The probate court of the county of

At a session of said court, held at the probate office in the of, in said county, on the day of, 19..

Present, honorable, judge of probate.

In the matter of the estate of, deceased.

Upon duly verified petition of praying for the appointment of a special of said to collect, take charge of, preserve and manage said estate, until a general can be appointed, it appearing to the satisfaction of the court that said estate requires immediate care and attention, and that it is necessary that a special should be appointed for the purposes aforesaid, and that is a competent and suitable person to execute said trust.

It is therefore ordered, that said be, and he

is hereby appointed special of said with full power and authority to collect, take charge of, preserve, and manage said estate, under the order and direction of the court, until a general shall be appointed, or until discharged by said court; that said make and return an inventory of said estate to this court, within days from the date of this order; and that of said county be, and they hereby are appointed appraisers to appraise said estate.

....., Judge of Probate.

2223 Michigan, general

³⁵ having been appointed for hearing the petition of of said deceased, praying that the administration of said estate be granted to, or to some other suitable person, and due notice of the hearing on said petition having been given as directed by said court, the said petitioner appeared; and it appearing to the court that the said deceased died on the day of, 19.., intestate; that ..he was, at the time of death, an inhabitant of the of in said county; that ..he left an estate within said county to be administered; that it is necessary that an administrator of said estate be appointed, and that of the of in said county is a competent and suitable person for that trust; it is ordered, that the said be and he is hereby appointed administrat.... of said estate, and that give bond in the penal sum of dollars.

.....
Judge of Probate.

2224 West Virginia

At a regular session of the county court of county continued and held for said county at the court house thereof on, the day of, 19..

Present, honorable, president, and and, gentlemen, commissioners of the county.

On motion of, is by the court duly appointed administrator of the estate of, deceased, late of said county.

Thereupon the said together with his surety entered into and acknowledged a bond in the penalty of \$..... conditioned according to law and took the oath required by law.

³⁵ Caption as in preceding form.

And on motion of said administrator,, and are by the court appointed appraisers to appraise the of said decedent after first being duly sworn according to law and make report to this court according to law.

b

In the matter of an administrator for the estate of

The court having maturely considered the matters arising on the motions heretofore made and papers filed, and on the protests now filed by and by, their attorney, and it appearing to the court that said died on the day of, 19.., at, in the county of, intestate, and that said at the time of his death had a residence and place of abode in said city, and that more than thirty days have elapsed since the death of the said, the court is of the opinion to and doth now appoint administrator of the personal estate of the said, deceased.

And thereupon the said appeared in person in this court and gave bond with and in the penalty of dollars as required by law, which bond the court now approves, as sufficient, and the said took the oath required by law.

And it is ordered that, and of the county of, after taking an oath for the purpose, shall appraise the goods and chattels of the said, deceased, and return their appraisement as the law directs.

To which action of the court on so appointing the said administrator of the estate of the said and excepted, and the said and by, his attorney, and said, by, their attorney, gave notice of their appeal; which appeal is now here allowed. And by her next friend,, filed her protest in writing to said appointment and asks that the same be made a part of the record; which is accordingly done. And she now excepts to the action of said court in appointing said, and she now gives notice of the appeal from said appointment, and on her motion this order is suspended for the period of days to allow said appeals to be perfected.

....., President.

ORDERS, TESTAMENTARY

2225 District of Columbia, general

On consideration of the petition of and other papers, and it appearing to the court that the will of said

deceased dated day of, 19.., has been duly filed, and the execution thereof proven by the oaths of all of the subscribing witness.. thereto, and no objection having been signified to the court, it is this day of, 19.., ordered, adjudged and decreed that the said will be, and the same hereby is admitted to probate and record; and it is further ordered that letters testamentary do issue to the said, the executor by the said will appointed, upon his giving bond in the penalty of dollars, conditioned for the faithful discharge of his duties.

2226 District of Columbia, real and personal property

Upon consideration of the petition of filed herein praying for the probate of the last will and testament of, deceased, as to both real and personal property and for the granting to her of letters testamentary thereunder, and it appearing to the court that the will of said decedent dated day of, 19.., has been duly filed and the execution of the said will duly proved by the oaths of the subscribing witnesses thereto; and further, it affirmatively appearing to the court that all of the heirs at law and next of kin of said decedent have appeared herein and answered the said petition by their guardian *ad litem*, and no objection having been signified to the court, it is this day of ordered, adjudged and decreed that the said will and testament be and the same hereby is admitted to probate and record as to real and personal property as the last will and testament of the said deceased; and it is further ordered the letters testamentary thereunder do issue to the executrix nominated in said will and testament upon her giving bond in the penal sum of dollars, conditioned for the faithful discharge of the trust in her reposed.

2227 Florida

By the judge of said court:

The last will and testament of having been duly admitted to probate and record in this court, on the day of, 19.., and it appearing by the said last will and testament that named therein as executor.. thereof, and the said having prayed the court to grant letters testamentary thereon to as such executor.., and no objection being made thereto, it is ordered, adjudged and decreed, that upon taking the oath prescribed by law, letters testamentary as aforesaid, under seal of this court, be granted to said as executor.. of said last will and testament.

Witness my name as judge aforesaid, and the seal of said court, at in said county, this day of, 19..

.....
County Judge.

2228 Florida, on certified copy

By the county judge of said county:

This day came on for consideration the matter of probate of the last will and testament of, deceased, late of county, state of, and it appearing to the satisfaction of the court that said last will and testament has been duly admitted to probate and record in the court in and for the county of, state of, the same being a court with probate jurisdiction, and a duly authenticated copy and transcript of said last will and testament, and the probate thereof having been filed in this court for probate and record, it is thereupon ordered, adjudged and decreed, that said last will and testament, bearing date, 19.., and admitted to probate and record in said court of on the day of, 19.., be and the same is hereby admitted by duly authenticated copy from said court to probate and record in this court as and for the last will and testament of the aforesaid, deceased.

Ordered at chambers, this day of, 19..
..... (Seal)
County Judge.

2229 Illinois, granting letters

It appearing to the court from the transcript of the proceedings in the circuit court of county, which is filed herein, that the will of, deceased, has been established and ordered to be admitted to record and probate. It is therefore ordered that the will of be admitted to record in this court.

Thereupon came of the county of and state of Illinois, and presented to the court his petition duly verified, and this day filed herein, praying that letters of administration with the will annexed on the estate of, deceased, may be issued herein to And it appearing to the court that said was named and appointed in and by the last will and testament of said decedent as executor thereof has this day filed herein his written renunciation of the appointment conferred upon him in and by said last will and testament, it is ordered that the said be appointed administrator with the will annexed of said estate on his presenting to this court his bond

as such administrator with the will annexed in the penal sum of dollars, conditioned as the law directs with good and sufficient sureties to be approved by this court.

And thereupon the said presented to the court his said bond in the penal sum of dollars, duly executed with and as his sureties. And the court having examined said bond, the same is approved and ordered to be recorded.

And thereupon the said took and subscribed his oath of office as such administrator with the will annexed. Whereupon, it is ordered by the court the letters of administration with the will annexed be issued herein to him accordingly under the seal of this court and that the same be recorded.

2230 Illinois, refusing letters

This cause coming on to be heard in the matter of the proof of will of, deceased, and all parties in interest being present in open court or represented herein by counsel; and the court having heard the evidence adduced by witnesses produced, sworn and examined in open court, finds from such testimony that said decedent was not of sound mind and memory at the time of the execution of said alleged will; and the court further finds that said alleged will was not executed as by statute is required. It is therefore ordered that said instrument in writing purporting to be the last will and testament of said decedent be and the same is hereby refused admission to probate.

b

And now on this day comes, the petitioner herein, and it appearing to the court from said petition that the said departed this life at, Illinois, on the day of, 19.., leaving said writing as and for her last will and testament; and it further appearing to the court from the testimony of, one of the subscribing witnesses of said last will and testament, who appeared in open court and on his oath testified that he was present and saw the said sign the same in his presence and that he heard her declare the same to be her last will and testament, that at the request and on the date of the execution of said last will and testament he signed his name as attesting witness thereto and that he believes that the said was of sound mind and memory, of lawful age and under no constraint at the time of so signing said last will.

And now comes in her own proper person and by her attorney,, and objects to the deposition of, one of the subscribing witnesses to said will, upon the grounds that she is the wife of the said, who is named in said will as executor, and also objects to the

admitting of said will to probate. Evidence is heard and the cause is argued by counsel, and the court being fully advised in the premises it is therefore ordered by the court that said will of be not admitted to probate.

To which findings the petitioner prays an appeal to the circuit court, which appeal is allowed upon the petitioner filing bond in the penal sum of dollars with surety to be approved by the court, same to be filed and approved within days from the date thereof.

2231 Maryland

In the orphans' court of

The court after having carefully examined the above last will and testament of, late of, deceased, and also the evidence adduced as to its validity, orders and decrees this day of, 19.., that the same be admitted in this court as the true and genuine last will and testament of the said, deceased.

.....

APPEAL

2232 Jurisdiction

An order admitting to probate a will which purports to, but does not, describe real estate, involves a freehold and, in Illinois, is reviewable by the supreme court.³⁶

2233 Application and notice (Mich.)

To, judge of probate for said county:

The undersigned being the widow of said deceased, and being aggrieved by the order or decree of the said judge of probate made on the day of, 19.., admitting to probate an instrument purporting to be the last will and testament of, deceased, as appears by the order and decree on file in said court, hereby gives notice of, and makes application for an appeal to the circuit court for said county, from the said order or decree of said judge of probate for the following specific reasons, viz.:

The deceased was mentally incompetent to execute the instrument propounded as his last will and testament.

The deceased was induced by means of fraud and undue influence exercised upon the part of the beneficiaries under said alleged will and others to execute the instrument admitted to probate.

³⁶ Craig v. Trotter, 252 Ill. 230.

The instrument admitted to probate was not executed and attested in conformity to the provisions of law.

Dated, etc.

.....

2234 Order (Va.)

In the office of the clerk of the circuit court of the county of the day of

This day came and, heirs at law of, deceased, and prayed for an appeal as of right, from an order entered by the clerk of the said court on the day of admitting to probate, the writing purporting to be the last will and testament of the said, deceased, and granting a certificate thereof to, the executrix therein named. And it is ordered that such appeal be allowed upon the said petitioners executing a bond, with surety, in the sum of dollars, conditioned according to law.

And at another day, to wit, day of in the office of the said court, said petitioners, with their surety, who justified on oath as to his sufficiency, entered into and acknowledged a bond in the penalty of dollars, conditioned according to law; which said bond is ordered to be recorded and said appeal is accordingly allowed.

Given under my hand the day and year last above written.

2235 Bond, requisites

In Illinois, since the act of 1897 concerning the probate of wills, an appeal bond in a matter of probate must be made payable to the parties and not the state, as the proceeding is in the nature of a proceeding *inter partes*, in all of its stages.³⁷ In probate matters, either the clerk or the judge may approve appeal bonds.³⁸

The fixing of the amount of an appeal bond is lodged by Michigan statute in the probate court, and its action in that regard is not reviewable on appeal.³⁹

ADMINISTRATION PENDING APPEAL

2236 Application (Mich.)

To the honorable, judge of probate:

I,, respectfully represent that I reside in the township of, in said county of, and am interested in said estate, and file this petition as the widow of said deceased.

³⁷ Schofield v. Thomas, 231 Ill. 118, 119.

³⁸ Schofield v. Thomas, 231 Ill. 119.

³⁹ Stevens v. Kirby, 156 Mich. 526, 536 (1909).

I further represent that said deceased departed this life on the day of, 19.., leaving a last will and testament, as I am informed and verily believe, said last will and testament bearing date of

I further represent that said deceased was at the time of his death an inhabitant of the township of, in said county, and left an estate within said county to be administered, and that the estimated value thereof is as follows:

Real estate dollars, or thereabouts.

Personal property dollars, or thereabouts, as I am informed and verily believe.

I further represent that the names, relationship, ages and residences of the heirs at law of said deceased are as follows:

....., your petitioner, widow, aged years, of county, Michigan;

....., brother, aged years, of county, Michigan.

Your petitioner further shows unto the court that upon the day of, 19.., an instrument in writing, purporting to be the last will and testament of said deceased, and bearing date of, 19.., was admitted to probate, pursuant to the order of this court; and that this petitioner has taken an appeal from the order admitting said alleged last will and testament to probate, to the circuit court for the county of, and has filed the notice and bond required by law.

Conceiving it to be for the best interests of said estate, your petitioner therefore prays that, of, Michigan, or some other suitable person may be appointed special administrator of said estate, with the powers of general administrator, during the pendency and until the determination of said appeal.

And your petitioner will ever pray.

b

To the honorable, judge of probate for the said county of

Your petitioner,, would respectfully represent to the court that he is interested in the estate of, as having a reversionary interest in said estate and as a creditor thereof; that application has been made to this court for the probating of the will of the said, deceased, and that said will has been duly admitted to probate, and has been appointed and duly qualified as the administrator of the estate of said, deceased; that an appeal has been duly taken as your petitioner has been advised from the order admitting the said will of, deceased, although no copy thereof has been served upon petitioner; that it will be a year before said appeal can be brought

on for a hearing in the circuit court; that meanwhile all the property of the said will remain without some one lawfully authorized to care for the same; and that the widow is old and cannot attend to said work, and is liable to be wheedled into situations to her disadvantage.

Your petitioner being the person most largely interested therein prays this court to appoint special administrator of the said estate, which consists of horses, pigs, cows, part of which the widow and has sold and made away with; and for such further order in the premises as may be agreeable to equity and good conscience and as may be required by the statutes in such case made and provided.

(Verification)

BONDS AND OATH

ADMINISTRATOR

2237 Florida

State of Florida }
..... county. } ss.

Know all men by these presents, that we,, are held and firmly bound unto, governor of the state of Florida, and his successors in office, in the just and full sum of dollars, for the true payment of which we bind ourselves, our heirs, executors, administrators, and assigns jointly and severally, firmly by these presents. Sealed with our seals, and dated this day of, 19...

The condition of this obligation is such, that if the above bounden of all and singular the goods, chattels, rights, and credits of, deceased, do make or cause to be made, a true and perfect inventory of all and singular the goods, chattels, rights, and credits of the said deceased which have or shall come to the hands, possession, or knowledge of, the said, or into the hands of any person or persons for, and the same so made do cause to be filed in the office of the county judge for the county of, at or before the day of, next ensuing; and all the goods, chattels, rights, and credits of the said deceased, at the time of the death of the said deceased, which at any time after shall come to the hands or possession of the said, or into the hands or possession of any other person or persons for do well and truly administer, according to law; and further make, or cause to be made, a true and just account of administration when required, and all the rest and residue of said goods, chattels, rights, and credits which shall be found remaining upon the final account, the same being first examined and allowed by the county judge of the county of; and shall deliver and pay to such person or per-

sons, respectively, as the said court, by its order or decree, shall appoint and direct; and if it shall thereafter appear that any last will and testament was made by the said deceased, and the executor or executors therein named do file the same in the office of said court, making request to have it allowed and approved, and the said will is allowed and approved by the said court, then if the said above bounden, being thereunto required, do surrender and deliver said letters of administration, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

(Signatures and seals)

Signed, sealed and acknowledged in presence of—

Oath

In court of county judge, state of Florida.

Estate of } county.

Before me,, county judge in and for said county, personally appeared, who, being duly sworn, say.. that, late of the county aforesaid, died on the day of, 19.., and that to the best of knowledge and belief the said died without a will; and the said further swear.. that will well and truly administer, according to law, all and singular the goods, chattels, rights and credits of the said, deceased; and that he will pay the debts in which the said decedent stood bound, so far as the assets will extend and the law direct, and make a just, true and perfect inventory and account of the said goods, chattels, rights and credits, and of administration thereof when thereunto required.

.....

Sworn to and subscribed before me this day of, 19..

2238 Illinois, to collect

Know all men by these presents, that we,, of the county of, and state of Illinois, are held and firmly bound unto the people of the state of Illinois, in the penal sum of dollars, current money of the United States, which payment well and truly to be made and performed, we and each of us bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness our hands and seals this day of, 19..

The condition of the above obligation is such, that if the above bounden shall well and honestly discharge the duties appertaining to ..h.. appointment as administrat..

to collect, of the estate of, late of the county of, deceased; shall make, or cause to be made, a true and perfect inventory of all such goods, chattels, debts and credits of the said deceased, as shall come to ..h.. possession or knowledge, and the same in due time return to the court of said county, and shall also deliver to the person or persons authorized by the said court as executors or administrators to receive the same, all such goods, chattels and personal estate as shall come to ..h.. possession as aforesaid, and shall in general perform such other duties as shall be required of ..h.. by law, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signatures, seals and residences)

Acknowledgment

State of Illinois, }
County of } ss.

I,, clerk of the court of county, in the state of Illinois, do hereby certify, that, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person, and acknowledged that they signed, sealed and delivered said instrument, as their free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and the seal of said court, at my office in the city of, in said county, this day of, 19..

.....
Clerk of the court.

Oath

I do solemnly swear, that I will well and honestly discharge the trust reposed in me as administrator to collect the estate of, deceased, according to the tenor and effect of the letters granted to me by the court of the said county of, to the best of my knowledge and ability, so help me God.

.....
Subscribed, etc.

2239 Illinois, general

⁴⁰ The condition of the above obligation is such, that if the said, administrat.. of all and singular the goods and chattels, rights and credits of, deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods and chattels, rights and credits of the

⁴⁰ Obligation and acknowledgment same as in preceding form.

said deceased, which shall come to the hands, possession or knowledge of ..h.. the said as administrat.., or to the hands of any person or persons for ..h.., and the same so made do exhibit, or cause to be exhibited, in the court of the said county of, agreeably to law; and such goods and chattels, rights and credits do well and truly administer, according to law, and all the rest of the said goods and chattels, rights and credits, which shall be found remaining upon the account of the said administrat.., the same being at first examined and allowed by the court, shall deliver and pay unto such person or persons, respectively, as may be legally entitled thereto; and further, do make a just and true account of all ..h.. actings and doings therein, when thereunto required by the said court; and, if it shall appear that any last will and testament was made by the deceased, and the same be proved in court, and letters testamentary or of administration be obtained thereon, and the said do in such case, on being required thereto, render and deliver up the letters of administration granted to ..h.. as aforesaid; and shall in general do and perform all other acts which may, at any time, be required of ..h.. by law, then this obligation to be void; otherwise to remain in full force and virtue.

(Names, seals and residences)

Oath

..... do solemnly swear that will well and truly administer all and singular the goods and chattels, rights, credits and effects of, deceased, and pay all just claims and charges against ..h.. estate, so far as ..h.. goods, chattels and effects shall extend, and the law charge; and that will do and perform all other acts required of by law, to the best of knowledge and abilities.

.....
Subscribed, etc., (before county or probate clerk)

2240 Illinois, will annexed

⁴⁰ The condition of the above obligation is such, that if the above bounden, administrat.., with the will annexed of, deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods and chattels, rights and credits, lands, tenements and hereditaments, and the rents and profits issuing out of the same, of the said deceased, which have or shall come to the hands, possession or knowledge of the said, or

⁴⁰ Obligation and acknowledgment same as in preceding form.

into the possession of any other person for and the same so made do exhibit in the court for said county of, as required by law; and also make and render a fair and just account of actings and doings, as such administrat.. with the will annexed to said court, when thereunto lawfully required; and do well and truly fulfill the duties enjoined on in and by the said will; and shall moreover pay and deliver to the persons entitled thereto, all the legacies and bequests contained in said will, so far as the estate of the said testat... will thereunto extend, according to the value thereof, and as the law shall charge; and shall in general do all other acts which may, from time to time, be required of by law, then this obligation to be void, otherwise to remain in full force and virtue.

(Signatures, seals and residences)

2241 Maryland, to collect

Maryland, Sct.

Know all men by these presents, that we,, all of county, are held and firmly bound unto the state of Maryland, in the full and just sum of dollars, to be paid to the state of Maryland aforesaid; to which payment, well and truly to be made and done, we bind ourselves and every of us, our and every of our heirs, executors, and administrators, in the whole and for the whole, jointly and severally, firmly by these presents, sealed with our seals, dated this day of, 19...

Whereas the validity of the will of, deceased, being contested, and the orphans' court for county being about to grant letters of administration pending such contest, to on the personal estate of the said deceased;

Now, the condition of the above obligation is such, that if the above bounden shall well and truly perform the office of administrat.. *pendente lite* of late of county, deceased, according to law, and shall in all respects discharge the duties of ..h.. required by law, as administrat.. *pendente lite*, aforesaid, without any injury or damage to any person interested in the faithful performance of the said office, then the above obligation shall be void; it is otherwise to be in full force and virtue in law.

(Signatures and seals)

Signed, sealed and delivered in the presence of

Oath

I,, do swear that I will well and honestly discharge the office of administrat.. *pendente lite* of the goods, chattels, personal estate and debts of, deceased,

according to the tenor of the letters granted to me by the orphans' court of county, and agreeably to the directions of law, to the best of my knowledge. So help me God.

The foregoing was taken and subscribed to, by the said, before the undersigned, Register of Wills for county, this day of, 19..

2242 Maryland, will annexed

⁴¹ The condition of the above obligation is such, that if the above bounden shall well and truly perform the office of administrat.. with the will annexed, late of county, deceased, according to law, and shall in all respects discharge the duties of h.. required by law, as administrat.. with the will annexed aforesaid, without any injury or damage to any person interested in the faithful performance of the said office, then the above obligation shall be void; it is otherwise to be in full force and virtue in law.

(Signatures and seals)

Signed, sealed and delivered in the presence of

2243 Maryland, de bonis non

⁴¹ Whereas, administration of all the goods, chattels and credits of, deceased, was heretofore granted and committed by the orphans' court for county, unto, the execut., by the last will and testament of the said deceased appointed; and whereas, the said hath since died before the estate of the said deceased hath been fully administered, as it is said; and the above bound having applied to the said court to grant h.. administration of all the goods, chattels, credits and personal estate not already administered, of the said deceased, with a copy of the will annexed of the said deceased, and the said court being about to grant the said letters of administration *de bonis non*, with the will annexed, to the said on the estate of the said deceased.

Now, the condition of the above obligation is such, that if the above bounden shall well and truly perform the office of administrat.. with the will annexed, of the goods, chattels, credits and personal estate, not already administered, of, late of county, deceased, according to law, and shall in all respects discharge the duties of ..h.. required by law, as administrat.. *de bonis non*, with the will annexed, aforesaid, without any injury, or damage to any person interested in the faithful performance of the said office,

⁴¹ Obligation same as in Section 2241.

then the above obligation shall be void; it is otherwise to be in full force and virtue in law.

(Signatures and seals)

Signed, sealed and delivered in the presence of

2244 Mississippi

State of Mississippi, }
 county, } ss.
 district. }

In the chancery court of said county,, 19..

Know all men by these presents, that we,, of the county and state aforesaid, are held and firmly bound unto the state of Mississippi, in the penal sum of dollars, lawful money, for the payment of which, well and truly to be made, we, and each of us, do bind ourselves, our heirs, executors and administrators, jointly, severally and firmly, by these presents.

Sealed with our seals, and dated this day of, 19..

The condition of this bond is, that if the above bound as administrat.. of the goods, chattels, rights and credits of, deceased, shall faithfully, truly and promptly perform and discharge all the duties required of by law, or by order of the court, then this obligation to be void; otherwise to remain in full force.

(Signatures and seals)

Approved the day of, 19..

....., Clerk.

Oath

State of Mississippi, }
 county. } ss.

You do swear, that, the deceased, died without any will so far as you know or believe; and that you will well and truly administer, all and singular, the goods, chattels and credits of the deceased, and pay debts as far as goods, chattels and credits will extend, and the law requires you; and that you will make a true and perfect inventory of all the said goods, chattels and credits, as also a just account, when thereto required. So help you God.

.....

Sworn and subscribed to before me, this day of, 19...

....., Clerk.

Sureties' oath

(Venue)

Personally appeared before me, clerk of chancery court of said county,, sureties on the within bond, who each being duly sworn, declare on oath, that they are worth, over and above all their just debts and liabilities, property in this state, subject to execution at law, to wit, the said, dollars, the said, dollars.

.....
.....

Sworn, etc.

| | | | |
|-------------------------------------|------------------------|--------------------------|--|
| In the Chancery Court of County. | Estate of Deceased. | Administra... Bond, etc. | Recorded in book, page, Clerk. By D. C. |
|-------------------------------------|------------------------|--------------------------|--|

EXECUTOR

2245 Florida

⁴² In court of the county judge, state of Florida.

In re the estate of }county.
..... }

Before me,, county judge of said county, personally appeared who being by me first duly sworn, say that late of the county of and state of died on the day of, 19.., leaving his last will and testament, and that the said deponent named therein as executor.. thereof. That will faithfully discharge the duties of executor.. aforesaid; well and truly perform the said last will and testament; pay the just debts in which the said stood bound, so far as the assets will extend and the law direct; render to and file in the county

⁴² Executors furnish bond only upon special request.

judge's court of said county of a just,
true and perfect inventory and account of all and singular the
estate of said deceased, and of
..... administration thereof when thereunto required.
.....
.....

Sworn to, etc.

2246 Illinois

⁴³ The condition of the above obligation is such, that if the
above bounden execut.. of the last will and
testament of deceased, do make, or
cause to be made, a true and perfect inventory of all and singular
the goods and chattels, rights and credits, lands, tenements
and hereditaments, and the rents and profits issuing out of the
same, of the said deceased, which have or shall come to the
hands, possession or knowledge of the said
or into the possession of any other person for ..h.., and the
same so made do exhibit in the court for said
county of, as required by law; and also make
and render a fair and just account of ..h.. actings and doings,
as such execut.. to said court, when thereunto lawfully re-
quired, and do well and truly fulfill the duties enjoined on ..h..
in and by the said will, and shall moreover pay and deliver to
the persons entitled thereto, all the legacies and bequests con-
tained in said will, so far as the estate of the said testat.. will
thereunto extend, according to the value thereof, and as the
law shall charge ..h.., and shall in general do all other acts
which may, from time to time, be required of ..h.. by law,
then this obligation to be void; otherwise to remain in full
force and virtue.

(Signatures, seals and residences)

2247 Maryland

⁴⁴ Whereas late of
county, deceased, did by his last will and testament nominate
said as the executor thereof, the
condition of the above obligation is such, that if the above
bounden shall well and truly per-
form the office of executor.. of late
of county, deceased, according to law, and
shall in all respects discharge the duties of ..h.. required by
law, as executor.. aforesaid, without any injury or damage to
any person interested in the faithful performance of the said

| | |
|---|--|
| ⁴³ Obligation and acknowledgment same as in Section 2238. | ⁴⁴ Obligation same as in Section 2241. |
|---|--|

office, then the above obligation shall be void; it is otherwise to be in full force and virtue in law.

Signed, sealed and delivered in the presence of
(Signatures and seals)

2248 Mississippi

⁴⁵ The condition of the above obligation is such, that if the said execut.. of the last will and testament of, deceased, do.. make a true and perfect inventory of all and singular the goods, chattels, and credits of the said deceased, which have or shall come to the hands, possession or knowledge of the said or into the hands or possessions of any other person or persons for and the same so made, do.. exhibit to the chancery court of county, district, at such time as shall be thereto required by the said court, and the same goods, chattels and credits do.. well and truly administer according to law, and make a just and true account of actings and doings therein, when thereunto required by the said court; and further do.. well and truly pay and deliver all the legacies contained and specified in the said will, as far as the said goods, chattels and credits will extend, according to the value thereof, and as the law shall charge then this obligation to be void; otherwise to remain in full force and virtue.

(Signatures and seals)

Approved day of
.....Chancery clerk.
....., D. C.

Oath

State of Mississippi, county:

You do swear, that the writing now exhibited by you to the court, is the true will and testament of as far as you know and believe, and that you, as execut..., will well and truly execute the same according to its tenor, and discharge the duties required by law: So help you God.

Sworn to, and subscribed in open court, this day of, 19...

....., Clerk.
....., D. C.

⁴⁵ Obligation same as in Section 2244.

LETTERS OF ADMINISTRATION

2249 District of Columbia, to collect

In the Supreme court of the District of Columbia,
Holding Probate court.

District of Columbia, }
United States of America. } ss.

To all persons to whom these presents shall come, greeting:

Know ye, that whereas administration of all the money, goods, and chattels, rights and credits of late of deceased, could not by the supreme court of the District of Columbia, holding a probate court, be forthwith granted and committed, because of the pendency of certain questions relating to the same, the said court on the day of, 19.., authorized and requested and to secure and collect the said personal estate of the said deceased, who, as said collector first executed a bond to the United States, with good and sufficient security, approved by the said court, in the penalty of dollars, conditioned for the faithful performance of the trust in reposed, and took the oath prescribed and required by law; and whose appointment is unrevoked and still in force.

Witness the honorable chief justice of said court, this day of, 19...

Attest:

.....
Register of wills for the District of Columbia, Clerk of the Probate court.
Case No.

2250 District of Columbia, general

⁴⁶ Know ye, that administration of all the money, goods, chattels, rights and credits of late of the deceased, is hereby granted and committed unto and of

2251 Florida

State of Florida, }
..... county. } ss.

In court of county judge.

Estate of

.....
To all to whom these presents shall come, greeting:

Whereas, deceased, late of this county, died intestate, having while lived and at the

⁴⁶ Caption and attestation as in preceding form.

time of death, divers goods, chattels and credits within the county aforesaid, by means whereof the full disposition and power of granting the administration of all and singular the goods, chattels and credits of the said deceased, and also a final dismission from the same to the county judge aforesaid does of right belong.

Now, know ye, that I, county judge for the county aforesaid, desiring that the goods, chattels and credits of said deceased may be well and truly administered and legally disposed of, do hereby grant unto administrat.. full power by the tenor of these presents to administer the goods, chattels, and credits of said deceased, which to in lifetime and at the time of death did belong, and to ask, demand, sue for, recover and receive the same, and to pay the debts in which the deceased stood bound, so far as assets will extend, according to law, and then the balance to pay over to the legal heirs and distributees of said deceased. And the said having given bond and security and taken oath, and performed all other requisites required by law necessary to just qualification as administrat.... is, by order of this court and by virtue of these presents, ordained, constituted and appointed administrat.. of all the goods, chattels and credits of said deceased.

Witness my name as judge aforesaid, and seal of office, this day of, 19.., at county aforesaid.

.....
County Judge.

County judge's certificate

(Venue)

I,, judge of the county court in and for the county and state aforesaid, do hereby certify the foregoing to be a true copy of letters of administration granted on estate of deceased.

Witness my hand and seal of office at this day of, 19..

2252 Illinois, to collect

The people of the state of Illinois, to all to whom these presents shall come, greeting:

Know ye that whereas,, late of the county of and state of Illinois, deceased, as it is said, had at h.. decess personal property within the state, the administration whereof cannot be immediately granted to the persons by law entitled thereto, but which, if speedy care be

not taken, may be lost, destroyed, or diminished; to the end therefore, that the same may be preserved for those who shall appear to have a legal right or interest therein, we do hereby request and authorize of the county of, and state aforesaid, to collect and secure the said property, wheresoever the same may be in this state, whether it be goods, chattels, debts or credits, and to make, or cause to be made, a true and perfect inventory thereof, and to exhibit the same with all convenient speed to the court of the said county of, together with a reasonable account of . . h . . collection, acts and doings in the said premises aforesaid.

Witness,, clerk of the court, in and for said county of, and the seal of said court, this day of, 19...

.....,
Clerk.

2253 Illinois, general

State of Illinois, }
county of } ss.

County court of county.

The people of the state of Illinois, to all to whom these presents shall come, greeting:

Know ye, that whereas,, of the county of and state of Illinois, died intestate, as it is said, on or about the day of, 19.., having at the time of h . . decease personal property in this state, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same; to the end, therefore, that said property may be collected and preserved for those who shall appear to have a legal right or interest, therein, we do hereby appoint, of the county of and state of Illinois, administrat.. of all and singular the goods and chattels, rights and credits which were of the said at the time of h . . decease; with full power and authority to secure and collect the said property and debts, wheresoever the same may be found in this state, and in general to do and perform all other acts which now are or hereafter may be required of h . . by law.

Witness,, clerk of the court in and for the said county of, and the seal of the said court this day of, 19..

....., Clerk.

2254 Maryland

Maryland, Set.,

State of Maryland,

To all persons to whom these presents shall come, greeting:

Know ye, that, late of county, deceased, hath died intestate, and administration of all the goods, chattels, credits, and personal estate of the said deceased, is hereby granted and committed unto, who is appointed administrat.. of the said deceased.

Witness,, esquire, chief justice of the orphan's court of county, this day of, 19..

Test:

Register of Wills for county.

2255 Michigan, special

State of Michigan,

The probate court for the county of

In the matter of the estate of

To of the of
greeting:

You have been duly appointed special of said estate, and having given a bond in the premises which has been duly approved and filed as required by law, I do by these presents commit unto you full power and authority to collect, take charge of, preserve, manage and dispose of all the goods, chattels, debts and property of said estate, according to law, and as said court shall direct; hereby requiring you to make and return to said court, within days, a true and perfect inventory of all the goods, chattels, rights, credits and effects of said estate, which shall come to your possession or knowledge, and within one month from the termination of this trust, and at any other time when required by said court, to truly account for all the goods, chattels, debts and effects of said estate, which shall be received by you, and upon the termination of this trust to forthwith deliver all the goods, chattels, money and effects of said estate in your hands to the general duly appointed in said matter, or to such other person as shall be legally authorized to receive the same, and to perform all orders and decrees of said court by you to be performed in the premises.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the of, in said county, this day of, 19...

.....
Judge of Probate.

2256 Michigan, general

State of Michigan,

The probate court for the county of

In the matter of the estate of, deceased.

To, of the of, greeting.

You having been appointed administrator of said estate, and having given a bond in the premises which has been duly approved and filed as required by law, I do by these presents commit unto you full power and authority to administer and faithfully dispose of, according to law, all and singular the goods, chattels, rights, credits and estate of said deceased, which shall at any time come to your possession, or to the possession of any other person for you, and to ask, gather, levy, recover and receive all the goods, chattels, rights, credits and estate, whatsoever of said deceased, which to at the time of death did belong; and to pay and discharge all debts and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by said court; hereby requiring you to make and return to said court, within thirty days, a true and perfect inventory of all the goods, chattels, rights, credits and real estate of said deceased which shall come to your possession or knowledge, or to the possession of any other person for you, and also to render a just and true account of your administration to said court within one year, and at least once in each year hereafter during your administration, and at any other time when required by said court, and to perform all orders and decrees of said court by you to be performed in the premises.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of, in said county, this day of, 19...

.....

Judge of Probate.

(Probate seal)

2257 Mississippi

State of Mississippi, } ss.
..... county. }

By the chancery court of said county, district.
To all to whom these presents shall come, greeting:

Whereas,, deceased, late of said county, died intestate, and had at death, credits and property in said state.

We, therefore, by these letters authorize as administra.... of the goods and chattels, rights and credits of said decedent, faithfully, truly and promptly to perform and discharge all the duties required of by law, or by the order of this court.

Witness, the honorable, judge of the
chancery court, at the court room thereof, city of
on the Monday of, 19., and seal of
said court.

Issued this day of 19..
....., Clerk.
..... D. C.

LETTERS TESTAMENTARY

2258 Florida

State of Florida, }
..... county. }ss.

In court of the county judge.

Estate of

To all whom these presents shall come, greeting:

Whereas,, late of the county
aforesaid, died on the day of, 19.,
leaving last will and testament, which, having
been satisfactorily proven, was, on the day of
....., 19., duly admitted to probate and record in this
court. And as by said last will and testament it appears that
..... having
prayed the court to grant letters testamentary thereon to
..... as such
and having, in due form of law, taken the prescribed oath, and
performed all other acts necessary to legal quali-
fications as such

Now, therefore, know ye, that I,,
county judge in and for the county aforesaid, by virtue of the
power and authority by law in me vested, do hereby declare the
said duly qualified by the laws of
said state to act as of said last will and testament,
with full power, by the provision of law and by virtue of these
presents, to administer all and singular the goods, chattels,
rights and credits of said and to
ask, demand, sue for, recover and receive the same; to pay the
debts in which the said stood bound,
so far as the assets shall extend and the law direct, and duly
entitled to have and hold, for the purposes directed in and by
the said last will and testament, all the estate of said
..... during the legal continuance of
..... administration, until the same shall expire by
virtue of the provisions of said last will and testament, or until
the power and authority hereby granted shall be duly revoked
according to law.

In testimony whereof, I hereunto set my hand and affix the seal of the county judge's court of the county aforesaid at
 this day of, 19...

.....
 County Judge.

2259 Illinois

State of Illinois, }
 County of } ss.

..... court of county.

The people of the state of Illinois, to all to whom these presents shall come, greeting:

Know ye, that whereas,, late of the county of and state of Illinois, died on or about the day of, 19.., as it is said, after having duly made and published h.. last will and testament, a copy whereof is hereunto annexed, having at the time of h.. death property in this state, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same; and inasmuch as it appears that ha.. been appointed execut.... in and by the said last will and testament, to execute the same; and whereas said ha.. filed h.. renunciation and refused to act as such execut....; and to the end that said property may be preserved for those who shall appear to have a legal right or interest therein, and that the said will may be executed according to the request of the said testat...., we do hereby authorize as administrat.... with will annexed, to collect and secure all and singular the goods and chattels, rights and credits which were of the said at the time of h.. decease, in whosoever hands or possession the same may be found, in this state, and well and truly to perform and fulfill all such duties as may be enjoined upon by the said will, so far as there shall be property and the law charge; and in general to do and perform all other acts which now or hereafter may be required of by law.

Witness,, clerk of the county court in and for said county of, and the seal of said court this day of, 19...

....., Clerk.

Clerk's certificate

State of Illinois, }
 county. } ss.

I,, clerk of the county court of county, in the state aforesaid, do hereby certify that the within is a true and correct copy of the last will and

testament of and the letters of administration with will annexed, issued to, on the day of, 19.., as appears from the original, on file in my office, and now in force.

In witness whereof, etc.

2260 Maryland

Maryland, Set.

State of Maryland,

To all persons to whom these presents shall come, greeting:

Know ye, that the last will and testament of
....., late of county, deceased, hath in due form of law been exhibited, proved and recorded in the office of register of wills for county, a copy of which is to these presents annexed, and administration of the goods, chattels and credits of the deceased is hereby granted and committed unto the execut.... by the said will appointed.

Witness,, chief justice of the orphans' court of county, this day of, 19...

Test:

.....,
Register of Wills, county.

2261 Mississippi

State of Mississippi, }
..... county. } ss.

By the chancery court of said county, district.

To all whom these presents shall come, greeting:

Whereas,, late of said county, deceased, had whilst lived, at the time of death, divers goods, rights and credits within the county and state aforesaid, and did make and publish last will and testament, and thereby constituted and appointed the said execut.... thereof; and whereas, also, the said last will and testament, has this day been admitted to probate in our said court, and the said ha.. taken the oath and given bond as required by law:

We do, therefore, hereby grant unto the said these our letters testamentary, authorizing and empowering to make an inventory of the estate of said testator, cause the same to be appraised, and make return of said inventory and appraisement into our said court as by law required; to pay first the debts of said testator; and then the legacies contained in the said will, so far as goods, chattels and credits will extend, and the law shall charge; to execute and perform the said last will and testament according to the true intent and meaning thereof; and

lastly, to render a just and true account of actions and doings herein, when thereto required by this court.

Witness, honorable, judge of the chancery court, of the county of, the Monday of, 19.., and the seal of said court hereunto affixed.

Issued the day of, 19...

....., Clerk.

By....., Deputy Clerk.

Filed for record the day of, 19...

And recorded the day of, 19...

....., Clerk.

By....., Deputy Clerk.

APPRAISEMENT

2262 Warrant (Ill.)

State of Illionis, }
County of..... } ss.

The people of the state of Illinois, to of the county of and state of Illinois, greeting:

This is to authorize you, jointly, to appraise the goods, chattels and personal estate of ⁴⁷ (the late firm of) (and of which firm) late of the county of and state of Illinois, deceased, (was in his lifetime a member), so far as the same shall come to your sight and knowledge, each of you having first taken the oath hereto annexed; a certificate whereof you are to return, annexed to an appraisement bill of said goods, chattels and personal estate by you appraised, in dollars and cents; and in the said bill of appraisement you are to set down in a column or columns, opposite to each article appraised, the value thereof.

Witness,, clerk of the court of county, and the seal of said court, this day of, 19...

....., Clerk.

Oath

We, and each of us, do solemnly swear that we will, well and truly, without partiality or prejudice, value and appraise the goods, chattels and personal estate of (the late firm of) (and of which firm) deceased (was in his lifetime a member), so far

⁴⁷ Omit matter within this and other parentheses if deceased was not a member of a firm.

as the same shall come to our sight and knowledge; and that we will, in all respects, perform our duties as appraisers, to the best of our skill and judgment.

(Three signatures and seals)

Appraisers.

Subscribed and sworn to before me,, clerk of the court of county, this day of, 19...

....., Clerk.

(Maryland)

State of Maryland,

To and, greeting:

This is to authorize you jointly to appraise the ⁴⁸ (goods, chattels and personal estate, or real estate), of late of county, deceased, so far as the same shall come to your sight and knowledge, each of you having first taken the oath or affirmation hereto annexed, a certificate whereof you are to return annexed to an inventory of the said (goods, chattels and personal estate or real estate) by you appraised in dollars and cents; and in the said inventory you are to set down in the column or columns opposite to each (article or piece or parcel of property) the value thereof.

Witness,, esquire, chief justice of the orphans' court for county this day of, 19...

(Seal)

Test:

.....
Register of Wills for county.

Oath

We and do swear that we will well and truly, without prejudice or partiality, value and appraise the ⁴⁹ (goods, chattels and personal estate or real estate) of late of county, deceased, so far as the same shall come to our sight and knowledge, and will in all respects perform our duties as appraisers to the best of our skill and judgment; so help us God.

(Signatures)

Appraisers.

⁴⁸ A warrant for the appraisement of personal estate should omit the phrase "real estate," and a warrant to appraise real estate should not include the phrase "goods, chattels and personal estate."

⁴⁹ Omit the phrase "goods, chat-

tels and personal estate" and insert the phrase "real estate" for the appraisement of real estate; and omit the phrase "real estate," and use the phrase "goods, chattels and personal estate" for the appraisement of personal estate alone.

I hereby certify that the foregoing oath was taken and subscribed to by the said and before the undersigned, a justice of the peace of the state of Maryland, in and for county, duly commissioned and qualified according to law, this day of, 19...

Justice of the Peace for county.

(Michigan)

State of Michigan, }
County of } ss.

The probate court of said county, by, judge of probate court.

In the matter of the estate of, deceased.

To of said county, greeting:

You are hereby empowered, as two suitable and disinterested persons, truly and justly to appraise, as soon as may be, in dollars and cents, all the estate and effects, both real and personal, comprised in the inventory of the estate of late of in said county, deceased, which may be in said county of, at the present value thereof, according to your best skill and judgment, being first sworn to the faithful performance of that trust.

And when you shall have performed that service as aforesaid, you are to deliver said inventory, together with this warrant, and your doings thereon, to of the of the said deceased, who is hereby accordingly directed so to return and exhibit the same on oath in the probate court of said county of within thirty days from the time of taking upon that trust.

Witness, the honorable judge of probate for said county, under his hand and the seal of said court, at.... this day of 19....

Judge of Probate for said county.

Probate Register.

Oath

(Venue)

On this day of, 19..., personally appeared before me, the undersigned in and for said county, appraisers above named, and

made oath that they would faithfully discharge the trust to which they are appointed by the foregoing warrant.

.....

Appraisers.

Subscribed, etc. (before notary public)

2263 Report; property not subject to appraisement (Ill.)

We, the undersigned, appraisers of the estate of, deceased, do hereby report to the county court of county, that no property belonging to said estate, subject to appraisement, has come to our sight or knowledge.

Witness our hands and seals, this day of
, 19....

..... [Seal]
 [Seal]
 [Seal]

Appraisers.

2264 Appraisal (Ill.)

A bill of appraisement of the estate of late of the county of and state of Illinois, deceased.
 (Insert items of property and its valuation)

We, the undersigned, appraisers of the estate of, deceased, do hereby certify that the foregoing is a full, just and impartial appraisement of the personal estate of said deceased, subject to appraisement, so far as the same has come to our sight or knowledge.

Witness, etc.

(Maryland)

A true and perfect inventory of all and singular, the⁵⁰ (goods, chattels and personal estate, or real estate) of late of county, deceased, appraised by us the subscribers and jointly, we having been first legally authorized, and having taken the oath prescribed by law, as will be seen by the warrant to appraise, and certificate therein annexed:⁵¹

⁵⁰ The phrase "goods, chattels and personal estate" should be omitted from an inventory of real estate; the phrase "real estate" should be omitted from an inventory of personal estate.

⁵¹ Here itemize articles and give value of each for personal estate inventory; insert the legal description of the real estate in the following form for real estate inventory:

A certain lot of ground in the city of, beginning on the side of street,

about feet of street; fronting on said first mentioned street about feet, with a depth of about feet to an alley.

Said lot of ground being subject to an annual ground rent of \$.....

Together with the improvements thereon being a story brick house, with story back building.

Value, \$.....

We, the subscribers, do certify that the foregoing is a true and just inventory, and valuation of all and singular, the ⁵⁰ (goods, chattels and personal estate, or real estate) of the said, deceased, so far as the same have come to our sight and knowledge; and as valued and appraised by us, in dollars and cents, according to the best of our skill and judgment.

In testimony whereof, we hereunto subscribe our names and affix our seals this day of, 19....
(Signatures and seals)

.....
Appraisers.

⁵² Amount of appraisement as above.

Cash in the house at time of deceased's death,

Cash in bank at time of deceased's death,

Whole amount of inventory,

Test:

.....
.....

Oath, personally

State of Maryland, } ss.
..... county. }

On the day of, came..... administrator *pendente lite* of, deceased, and made oath in due form of law, that the foregoing is true and perfect ⁵³ (additional) inventory of all and singular the goods, chattels and personal estate of the said deceased that have come to his hands, knowledge or possession at the time of making thereof, that what has since, or shall hereafter come to his hands, knowledge or possession, he will return in an additional inventory, that he knows of no concealment, nor suspect any to be, that if he should hereafter discover any concealment, or suspect any to be, he will make the register of wills for county acquainted therewith, that the same may be inquired into according to law.

Sworn to before the subscriber,

.....
.....

Test:

Register of Wills for county.

⁵² Omit in real estate inventory and insert instead: Amount of inventory as above \$.....

⁵³ In original inventory omit the word "additional."

| | |
|---|--|
| Inventory of Personal Estate of Deceased. | |
| <hr/> <hr/> | |
| Filed, 19.. | |
| Passed by order of court this day of....., 19.. | |
| | |
| | |
| | |
| <hr/> <hr/> | |
| Recorded in liber..... | |
| No. | |
| Folio | |

Oath, realty

State of Maryland, } ss.
county }

Be it remembered and it is hereby certified that on this day of, 19.., personally appeared administrator *pendente lite* of late of county, deceased, and made oath in the presence of Almighty God that the foregoing is a just and true and perfect inventory of all and singular the real estate of the said, deceased, within the state of Maryland, that has come to his knowledge and that should he thereafter discover any other real estate belonging to the said deceased in said state he will return an additional inventory thereof.

Sworn to before the subscriber.

Register of Wills for county.

(Michigan)

State of Michigan, } ss.
County of..... }

A true and perfect inventory of all the real estate, goods, chattels, rights and credits of late of in the county of, deceased, which have come to the knowledge or possession of of said deceased, that is to say:-

We, the undersigned appraisers, appointed by the judge of probate for the county of _____, by virtue of the foregoing warrant, having first taken the oath prescribed by law for the faithful discharge of the trust under such appointment, do hereby certify that we have truly and justly estimated and appraised all the estate and effects of _____ late of _____ in said county, deceased, as exhibited to us and comprised in the foregoing inventory, according to

the best of our skill and judgment, at the respective sums placed opposite each item therein mentioned.

Dated, 19....

.....

Appraisers.

Oath

State of Michigan, }
 County of..... } ss.

The probate court for the county of

In the matter of the estate of deceased, of said deceased, personally appeared and made oath that the foregoing is a true and perfect inventory of all the estate of said deceased that has come to knowledge or possession; and that ifhe.... shall hereafter know or become possessed of any further assets belonging to the estate of said deceased,he.... will make return thereof unto the probate court of said county for record thereof.

.....

Executor or administrator.

Sworn to and subscribed before me this day of, 19....

INVENTORIES

2265 Insurance, benefit

Moneys due upon an insurance benefit certificate are no part of the certificate holder's estate and are not subject to payment of debts or cost of administration.⁵⁴

2266 District of Columbia

Supreme court of the District of Columbia,
 Holding probate court.

Inventory of money and debts due to deceased.

District of Columbia, to wit:

..... and of late of, deceased, do solemnly swear that the foregoing schedule is a true and perfect inventory of all the money belonging to the deceased, and of all the debts due to the said deceased, which have come to

⁵⁴ Martin v. Modern Woodmen,
 253 Ill. 400, 403 (1912).

hands or knowledge, and that will well and truly charge with all money and all and every such debt or debts as shall hereafter come to knowledge or possession.

.....
.....

Sworn to and subscribed before me this day of, 19....

Register of Wills for the District of Columbia,
Clerk of the probate court.

2267 Illinois

State of Illinois, }
county. } ss.

In the probate court of county.

In the estate of }
..... } Administrator.⁵²
Deceased. }

A full, true, just and perfect inventory of all the property, estate and effects belonging to the estate of said, deceased.

Cash

Money on hand from administrator to collect \$....

Bonds

(Describe the same)

Real estate

(Give full description)

The title by warranty deed from to said for the sum of, recorded, etc.

Abstract of title. Incumbered (as the case may be). Estimated value of this property is dollars.

Administrator as aforesaid.

I,, administrator⁵⁵ of the estate of deceased, do hereby certify that the foregoing document by him subscribed as administrator of the estate of said, deceased, is a full, true, just and perfect inventory of all the estate, property and effects belonging to the estate of said deceased, so far as the same has come to my hands, sight, possession or knowledge, or the hands, sight, possession or knowledge of any other person or persons for me to my knowledge.

.....
Administrator as aforesaid.

⁵⁵ The inventory of an administrator to collect is of personal property alone and is in all respects similar to an inventory of an adminis-

trator in due course, except that the certificate should show that the inventory is that of an administrator to collect.

2268 Michigan

State of Michigan,
The probate court for the county of
In the matter of the estate of, deceased.
A true and perfect inventory of all the personal estate, goods,
chattels, rights and credits of said estate, to wit:

| | | Dollars | Cts. |
|-------|-------|---------|-------|
| | | | |
| | | | |
| | | | |

State of Michigan,
The probate court for the county of
In the matter of the estate of county of
....., ss.
..... of said estate, being duly sworn, says that
the foregoing is a true and perfect inventory of all of said
estate that has come to my knowledge or possession, and if I
shall hereafter become possessed of any further assets belong-
ing to said estate I will make return thereof to said court.
.....
Subscribed, etc.

HEIRSHIP

2269 Petition and order (Mich.)

State of Michigan,
The probate court for the county of
To the probate court for said county:
In the matter of the estate of,
deceased.
I,, respectfully represent that I reside
in the of in said county, and am
interested in the real estate of which said deceased died seized
and make this petition as
of said deceased.
I further represent that, as I am informed and believe, said
deceased died on the day of,
19..; and was, at the time of death, seized of
real estate within the state of Michigan, a portion of which is
situated in said county, described as follows, to wit:
I further represent that the names, relationship, ages and resi-
dences of the persons who were the legal heirs of said deceased
at the time of death are as follows:

| Name | Relationship | Age | Residence |
|-------|--------------|-------|-----------|
| | | | |
| | | | |

I therefore pray that said court adjudicate and determine who were at the time of death the legal heirs of said deceased and entitled to inherit said real estate.

.....
P. O.

(Verification)

Order

State of Michigan, } ss.
..... county. }

At a session of the probate court for said county, held at the probate office, in the city of on the day of, 19..

Present, honorable, judge of probate. In the matter of the estate of, deceased.

On filing the petition, duly verified, of of said deceased, praying this court to adjudicate and determine who were at the time of death, or are now the lawful heirs of said deceased and entitled to inherit the real estate of said deceased, it is ordered that the day of next, at ten o'clock in the forenoon, at said probate office, be assigned for the hearing of said petition

It is further ordered that a copy of this order be published in the for three successive weeks.

.....
Judge of Probate.

REVOCATION OF LETTERS

2270 Practice

It is proper practice, in Illinois, to proceed in the probate or county court by motion or petition to set aside the probate of a will for want of jurisdiction.⁵⁶

2271 Petition (Ill.)

To the honorable, judge of said court.

Your petitioner, respectfully represents unto your honor that he is a nephew and heir at law of late of the county of and state of; that the said departed this life on or about the day of, 19..; that on or about the day of of said year an instrument in writing purporting to be the last will and testa-

⁵⁶ Schofield v. Thomas, 231 Ill. 123, 124.

ment of the said was filed in the office of the clerk of the probate court of said county; that upon the same day a petition was filed in said court for the probate of said writing by one who is named as executor and sole legatee in said alleged will; that said petition alleges that the said died on the day of, 19.., leaving a last will and testament; that said, who was named as executor is willing to accept the trust confided to him in said will; that the said died seized of real and personal property of the value of dollars; that the said left her surviving her only heirs at law, a second cousin of county, and other heir or heirs at law if any if living whose name or names, address or addresses are unknown and upon due search and inquiry cannot be ascertained.

That at the time of the filing of the said petition by the said, he was and still is a resident of county in the state of and had no notice of the time and place when and where it was proposed to present said alleged will for probate; that he did not even know that the said was dead; that his name was not inserted in the said petition for the probate of said alleged will, although the said well knew the name of your petitioner and that he was an heir at law of said

And your petitioner avers and charges the fact to be that the said knowingly and designedly left the name of your petitioner out of said petition to probate the alleged will, in order that he might have no notice of the time and place when and where it was proposed to present the said alleged will for probate, and to keep your petitioner in ignorance of the death of the said; that the clerk of the said probate court only mailed notices of the time and place, when and where it was proposed to present said alleged will for probate, to the person named in said petition, and did not mail any notice of such time and place to your petitioner; that the said alleged will was not the last will and testament of said, and your petitioner truly believes that if he had notice of the time and place when and where the same was to be presented for probate, he could have made a good defense to the petition asking for the probate thereof both in this court and in the circuit court to which the same was appealed as hereinafter shown; that the said instrument was refused probate by the honorable court on or about the day of, on the grounds that the same was not executed in accordance with the provision of the statute, and because the said at the time of the execution of said instrument, was not of sound and disposing mind and memory, as will more fully appear from the order entered by this honorable court on said hearing; that from the said order refusing the probate of

said alleged will, the said appealed to the circuit court of said county, but your petitioner had no notice whatsoever of the said appeal or any proceeding relating thereto, although the said well knew the name of your petitioner and that he was an heir at law of the said; that upon a hearing in the said circuit court, the said petition to probate said alleged will was sustained by the court, and the said circuit court made a finding whereby said alleged will was held and decreed to be the last will and testament of the said; that upon the day of, 19.., the said presented to the honorable court another petition, praying for the probate of said alleged will, and with said petition, a certified copy of the proceedings in the circuit court on said appeal; whereupon, this honorable court admitted the said alleged will to probate as the last will and testament of said

This petitioner further represents that he has had no notice of either the death of said or any of the aforesaid proceedings until the latter part of, and after the time had elapsed in which he could file a bill to set aside the said alleged will and the probate thereof; and he alleges that the said withheld from him the information relating to the death and the proceedings relating to the said alleged will of, for the fraudulent purpose of depriving your petitioner of his rights in the premises; that the said, the second cousin named in said petition for the probate of said alleged will, filed her bill within the statutory time to set aside the probate of said alleged will; that the said filed an answer to said bill, denying that the said was an heir at law and entitled to maintain said bill, for the reason that there were nearer relatives who would inherit from; and that immediately after the statute of limitations had run against your petitioner and when he could no longer file a bill in chancery to set aside the probate of said alleged will, the said through his attorney, opened up correspondence with your petitioner and brought him here from the state of to establish the fact that your petitioner was the nephew of said and thereby to defeat the right of said to maintain her said bill.

That the said worked in the family of the said for or years; that the husband of the said died in the fall of, after which the said assumed full charge of the business of and during which time he had great control and influence over her; that the said attended to the correspondence of the said and as your petitioner is informed and believes, would not permit her to write to your petitioner during the last year and a half of her life; that for years prior

to the death of her husband, the said and your petitioner corresponded; that they exchanged photographs on several occasions and your petitioner on one occasion sent to the said his photograph, with the following inscription on the back of it in his own handwriting (Insert inscription); that said photograph also contained the name and residence of the photographer; that on the hearing of the bill filed by said, defendant,, by his attorney, introduced in evidence one of the photographs which your petitioner had sent to the said, and some letters which were written by your petitioner and were in the possession of the said at the time of her death; and that upon the death of the said the said took immediate possession of all her personal effects, including the letters and photographs above mentioned.

And your petitioner says that from said pictures and letters in the possession of said, he could easily have obtained the address of your petitioner even if he did not know it at the time he filed his said petition for the probate of said alleged will, but your petitioner alleges that said well knew his name and address, but fraudulently withheld the same from this court so that your petitioner would not appear and contest the probate of said writing; that the said was in no wise related to the said; that he is a spendthrift and a man of low and vicious habits; that during the last years of the life of, the said collected the rents and profits from the said property and squandered the same for liquor; that during said years he kept the said under the influence of liquor almost constantly; that our petitioner is prepared to prove that at the time of the execution of said alleged will, the said was intoxicated; that said instrument was prepared at the dictation of said and one who claims to be an attorney, and who prepared said instrument; that said had never known the said prior to said time, and was never employed by her to prepare her last will and testament; that the alleged will was never attested in the presence of said nor at her request as shown by the evidence of the subscribing witnesses on file in this court; that said witnesses signed said alleged will solely at the request of the said; that at the time of the execution of said instrument the said was not of sound and disposing mind and memory; that the said alleged will is the result of fraud and undue influence practiced upon the said by the said; and that at the time of the execution of the said writing the said was subject to insane delusions regarding her family relations and was not competent to make a will.

Your petitioner further avers that all of the aforesaid proceedings relating to the probate of said alleged will were had in fraud of the rights of your petitioner and without notice to him, all of which your petitioner is prepared to prove.

Your petitioner therefore prays that the order heretofore entered admitting said alleged will to probate in this court and all other proceedings relating to said alleged will be vacated and set aside, and that your petitioner be permitted to show the facts set forth in this petition.

(Verification)

.....

b

(Caption)

To the honorable judge of said court:

And now comes and shows to the court that , late of the said county, departed this life on day of , 19.., leaving him surviving the following children and grandchildren, his only heirs at law, to wit: and the last three being the children and heirs at law of , deceased, daughter of said deceased.

That said died possessed of about dollars worth of personal property, and acres of real estate, situate in the said county.

That on his death-bed the said requested of his children and grandchildren that his estate be kept out of court, and the proceeds remaining to be divided amicably between his heirs without the costs and expenses attending administration and court proceedings, and that said children promised him to do so. That thereafter in accordance with the injunction and request of their said father and complying therewith, all of the children and grandchildren agreed that should take possession of the personal estate of the heirs and sell the same, and pay said few debts incident to his burial and last illness, and also erect a suitable monument to his memory, and the remainder to be divided share and share alike.

That their said father had informed them that he owed comparatively nothing, and had given his children a statement of what he did owe, and that there was money on hand to pay all of said debts in full. That an agreement was written out and signed by all of the heirs at law, except then of the age of years, and that for him his legally appointed guardian, signed the said agreement; a copy of which is hereto attached marked exhibit "A."

That thereafter your petitioner paid every debt known to exist against the said or his estate, funeral expenses and all other claims. That her said father, in his lifetime, made it a rule to pay cash for everything he purchased,

and that no debts, except as hereinbefore stated, were known to be owing to any person. That in accordance with the request of said heirs this petitioner took possession of all the personal property for them as their trustee and agent, and advertised the same in accordance with said contract for sale, and the same was sold, on day of, 19...

That on day of, 19..., one public administrator of said county, filed his petition in the court aforesaid, to be appointed administrator of said estate of, deceased. That it was not alleged in said petition that said public administrator had knowledge of any debt or debts owing by said estate to any creditor or creditors, or that the petition was filed by any person interested in the estate of said, or in behalf of any person who was a creditor of said estate or having any interest therein. And this petitioner further shows that said was not interested in the estate of deceased, nor concerned in any manner with it, and that the court had no jurisdiction of the said petition or of said estate under said petition.

That the heirs aforesaid and this petitioner are ready, able and willing to pay all persons having claims against said estate the full amount of their claims. That they are thoroughly conversant with the business affairs of said decedent and know that there are no outstanding debts. That said deceased was blind a great many years before his death, and this petitioner transacted all his business for him and was thoroughly acquainted with all the details of the same, and she knows that there are no debts due from said estate to any person.

She therefore prays that the court will revoke the letters of administration granted to said and discharge him from any further connection with said estate; that this petitioner shall be awarded the notes and moneys arising from the sale of the said property and all other personal estate of the said taken possession of by her since the decease of said, under said agreement; and that she be granted any other relief the court may deem proper.

.....
By
her solicitor.

(Verification)

(Maryland)

In the orphans' court of
In the matter of the estate of }
..... }
Deceased. }

To the honorable, the judges of the orphans' court of

The petition and caveat of and, respectfully shows unto your honors:

1. That, late of and state of Maryland died on the day of, 19.., in the city of, leaving no husband or children, no brothers or sisters, or other relatives except your petitioners, who are the nearest of kin of the said

2. That after the death of the said, the company offered for probate in this court a paper writing dated the day of, 19.., purporting to be the last will and testament of the said, and without contest an order was passed on the day of, 19.., by this honorable court, admitting the said will to probate, and letters testamentary thereon were granted to the company, which was named as executor in said alleged will.

3. Your petitioners further show and charge that said paper writing was not the last will and testament of said, but that the said died intestate; that the said alleged will was not signed by the said, or by any person in her presence by her express direction or attested or subscribed in her presence by two or more creditable witnesses; that the said was at the time of her death, old in years and infirm in body and at the time of the execution of said alleged will she did not know or understand the contents of said paper writing, and that the said alleged will was not executed by the said when she was of sound and disposing mind and capable of executing a valid deed or contract.

Your petitioners pray that the said company may be required to answer the premises and that the order of this honorable court admitting to probate the said alleged will may be annulled and set aside, and that letters testamentary granted to said company may be revoked.

And as in duty, etc.

.....
.....

Attorneys for caveators.

2272 Answer (Md.)

To the honorable, the judges of said court.

The answer of the company of, executor of the last will and testament of, deceased, to the petition and caveat of and respectfully shows unto your honors as follows:

That the above mentioned petitioners and caveators had no right in law to file, or proceed with the prosecution of, the said petition and caveat, for the reason that at or prior to the filing thereof, these same petitioners and caveators filed, in the circuit court No. .. of, a bill in equity against this

executor and various legatees mentioned in said will of
, asking the court of equity to construe various provisions of said will, and particularly to declare some of the legacies to be invalid for the reasons stated in said bill; that the filing of said bill is a decisive act of election on the part of said petitioners and caveators to treat the said will of as a valid will so far as the factum thereof is concerned, inasmuch as it is impossible for a court of equity to construe a will, or pass upon the validity of the legacies therein, without the admission on the part of the complainants in said bill that the will is valid as to its factum.

The company of, executor, as aforesaid, therefore, asks the court to have the said petition and caveat dismissed.

.....

Attorneys for executors.

2273 Order (Ill.)

And now on this day of, 19.., this matter having come on for trial upon the petition of, to vacate and set aside the order of this court heretofore entered on, to wit, the day of, 19.., probating and admitting to record the certain instrument in writing on file in this court, bearing date of the day of, 19.., and purporting to be the last will and testament of, deceased, and all orders and proceedings relating to the probate thereof; and the answer of
, the sole legatee and devisee named therein, and the replication of the said to said answer; and the said parties being each present in person and by counsel, and the court having heard all the evidence introduced in open court and arguments of counsel for the respective parties, and being fully advised in the premises, doth find all of the material allegations in said petition are substantially true.

And the court further finds that the said is an heir at law of the said, deceased, and that he had no actual or constructive notice of the hearing on the petition to probate the said instrument as the last will and testament of said, deceased, nor any of the proceedings thereunder, until more than one year elapsed from the probate of said instrument and the issuance of letters of administration with the will annexed.

The court further finds from the evidence that the proponent of the alleged will of, who is the sole legatee and devisee thereunder, upon whose petition filed herein an administrator with the will annexed has been appointed, knew at the time of the filing of his sworn petition in this court for letters testamentary that the petitioner herein was an heir at law of the said, and that the proponent had at that

time within his possession and under his control evidence of the name, relationship and residence of said, which he fraudulently omitted from said petition and concealed from this court for the purpose of depriving said of notice of the time and place of the hearing upon said petition for proof of said will.

And the court further finds that the order heretofore entered probating and admitting to record the said instrument in writing bearing date of, and purporting to be the last will and testament of said, deceased, and all the proceedings in reference thereto were had and entered without any jurisdiction of court as to said, and that the probate of said instrument was procured by the fraud of the said

It is therefore considered and found by the court that the probate of the said instrument in writing bearing,, and purporting to be the last will and testament of the said, deceased, and all of the proceedings relating to the probate thereof are wholly null and void as to said

And it is further ordered, adjudged and decreed by the court that the probate of said instrument bearing date of,, on file in this court and purporting to be the last will and testament of the said, deceased, and all of the proceedings relating to the probate thereof be and the same are hereby annulled, vacated and set aside.

2274 Appeal

An order of the county or probate court setting aside the probate of a will is not appealable, because the order is not final.⁵⁷ But an order admitting or refusing a will to probate is final and appealable.⁵⁸

PROCEEDINGS FOR POSSESSION OF PERSONAL PROPERTY

2275 Petition (Ill.)

To the honorable:

Your petitioner, administrator, etc., of the estate of, deceased, respectfully shows unto your honor that one is now in possession of the following described property and chattels, to wit: (Describe same).

Your petitioner further represents that this property was in her lifetime the property of said, deceased, and that said property now belongs to this estate uncondition-

⁵⁷ Schofield v. Thomas, 231 Ill. 114.

⁵⁸ Dean v. Dean, 239 Ill. 426.

ally, and that it is for the best interests of this estate that your petitioner, as administrator, etc., obtain possession of said property and hold the same as assets of this estate.

Wherefore, your petitioner respectfully asks for a rule on said to turn over said property to your petitioner as administrator, etc., of this estate, and for such other and further relief and orders as your honor may deem necessary and just.

.....
Administrator, etc.

(Verification)

CLAIMS AGAINST ESTATES

2276 Claims, nature

In the county or probate court the prosecution of a claim against an estate of a deceased person is, in Illinois, neither an action at law nor a suit in chancery, but it is purely a statutory proceeding. The claim may, however, partake of the nature of either action, according to the character of the powers that the trial court is called upon to exercise, and it must be tried and determined as a suit at law.⁵⁹

2277 Promissory notes as bequests

The incorporation of an extrinsic writing, such as a promissory note, in a will by reference, which would have a testamentary effect, may be accomplished by referring to the writing as then existing and showing an intention to make it a part of the will, by describing the writing in the will in a manner that it could be reasonably identified, and by proving that it is the identical instrument that has been thus referred to and described in the will.⁶⁰

ADJUDICATION

2278 Illinois, notice

Estate of, deceased.

All persons having claims against the estate of, deceased, are hereby notified and requested to attend and present such claims to the court of

⁵⁹ Zeigler v. Illinois Trust & Savings Bank, 245 Ill. 180, 191, 198 (1910); Sec. 60, Administration act (Ill.); De Clerque v. Campbell, 231

Ill. 442, 447 (1907); Mayer v. Schneider, 212 Ill. 286, 288 (1904).

⁶⁰ Keeler v. Merchants Loan & Trust Co., 253 Ill. 528, 535 (1912).

county, Illinois, for the purpose of having the same adjusted, at a term of said court, to be held at the court room, in the city of, in said county, on the Monday of, 19.., being the day thereof.

Dated, etc.

2279 Illinois, proof

State of Illinois, }
County of..... } ss.

..... being duly sworn, deposes and saith, that he did, on the day of, 19.., post six notices, of which notices the above is a copy, in the following places in this county, to wit:

One at the door of the court room.....

One at (Designate five other places of posting).

All of which are the most public places in said county.

Sworn, etc.

2280 Maryland, notice

Notice is hereby given, that the subscriber.. of county, ha.. obtained from the orphans' court for county, in Maryland, letters on the personal estate of, late of county, deceased. All persons having claims against said deceased are hereby warned to exhibit same, with the vouchers thereof, to the subscriber, on or before the day of, 19..; they may otherwise, by law, be excluded from all benefit of said estate. All persons indebted to said estate are requested to make immediate payment.

Given under my hand this day of, 19...

.....
.....

2281 Maryland; report and approval

To the honorable, the judges of the orphans' court for county:

The report of respectfully shows that in pursuance of an order of this court passed on the day of, 19.., ..he.. gave the required notice to the creditors of said deceased to exhibit their claims duly authenticated as will appear by reference to the certificate of publication of the, a newspaper published in the city of county, hereto annexed.

.....
.....

(Attach adjudication notice)

Certificate of publication

....., Md. 19...
 certify that the above notice to creditors in
 the estate of, was published in the,
 a weekly newspaper published in the city of,
 once a week for successive weeks before the
 day of, 19.., the first insertion being
 made the day of, 19..
 Publisher.

On the day of, 19.., before me personally appeared, deceased, and made oath in due form of law, that the matters and facts contained in the foregoing report are true as therein stated.

.....
Register of Wills for county.

In the orphans' court for county,

It appearing to the satisfaction of this court that its order of the day of, 19.., directing notice to be given to the creditors of, deceased, to exhibit claims duly authenticated has been complied with and that said notice has been given as above reported, it is there-upon, by this court, ordered this day of, 19.., that said report and certificate and this order be recorded among the records of this court.

.....CJ.
.....A.J.
.....A.J.

| | |
|-------------------|--------------|
| Estate No. | |
| Report of | |
| | |
| | |
| | |
| In the estate | |
| | |
| | Deceased. |
| Filed | day of |
| |, 19... |
| Recorded in liber | |
| No. | |
| Folio | |

2282 Michigan, petition

State of Michigan,

The probate court for the county of
 To the probate court for said county.

In the matter of the estate of, deceased.

I,, respectfully represent that I reside in the
 of in said county, and am
 interested in said estate and make this petition as
 of said deceased.

I pray that the time for presenting claims against said estate
 be limited, and that commissioners be appointed to receive, ex-
 amine and adjust all claims and demands against said deceased.

.....
 P. O.

Subscribed and sworn to before me this day of
, 19..

.....
 Notary Public, county, Michigan.

2283 Michigan, order

State of Michigan,

The probate court for the county of

At a session of said court, held at the probate office in the
 of, in said county, on the
 day of, 19..

Present: honorable, judge of probate.

In the matter of the estate of, deceased.

..... having filed in said court
 petition praying that the time for the presentation of claims
 against said estate be limited, and that commissioners be ap-
 pointed to receive, examine and adjust all claims and demands
 against said deceased,

It is ordered that six months from this date be allowed for
 creditors to present claims against said estate;

It is further ordered, that
 and be and are hereby appointed com-
 missioners to receive, examine and adjust all claims and de-
 mands against said deceased.

.....,
 Judge of Probate.

2284 Michigan, notice

State of Michigan,

The probate court for the county of

In the matter of the estate of, deceased.

Having been appointed commissioners to receive, examine
 and adjust all claims and demands of all persons against said
 deceased, we do hereby give notice that six months from the

..... day of, 19.., were allowed by said court for creditors to present their claims to us for examination and adjustment, and that we will meet at in said county, on the day of, 19.., and on the day of, 19.., at ten o'clock in the forenoon of each of said days, for the purpose of examining and adjusting said claims.

Dated, 19..

.....

 Commissioners.

PROOF OF CLAIM

2285 District of Columbia

Supreme court of the District of Columbia,
 Holding probate court.

District of Columbia, to wit:

Personally appeared, agent of, who, being duly sworn or affirmed according to law, doth depose and say that the annexed account against is correctly copied from the books of original entry of said; that the charges were made in said books at or about the time of their respective dates; that the goods for which said charges were made were sold and delivered as charged; that the charges are correct, and the account just and true as stated; that there is now due and owing thereon the sum of; that no part of said sum has ever been paid or in any manner settled or secured; and that there are no deductions or offsets of any kind except such as are therein specified and credited.

Subscribed and sworn to before me this day of, 19..

.....,
 Register of Wills for the District of
 Columbia, clerk of the probate court.

\$
 Will pass claim when paid.

.....,
 Justice.

.....,
 Register.

2286 Illinois

..... court of county.

State of Illinois, }
County of } ss.

..... being
duly sworn, deposes and says that the annexed claim against the
estate of, deceased, is just and
unpaid, after allowing all just credits, and that
no other claim against said estate.

Subscribed and sworn to before me, this day
of, 19...

.....
Clerk of the court.

Appearance

..... hereby enter appearance in the matter of the
within claim and waive service of process thereon.

Consent

..... hereby consent to the allowance of the within
claim for \$....

2287 Maryland

State of Maryland, }
..... County, } sct.

On the day of, 19..., before the
subscriber, register of wills in and for said county, personally
appeared and
made oath in due form of law that the foregoing
is just and true; and that to the best of his knowledge and belief
no part of the money intended to be secured by said instrument
hath been received, or any security or satisfaction given for the
same, except what (if any) is credited.

Sworn before

.....
Register of Wills for county.

2288 Michigan, presenting and filing

In Michigan, at any time before an estate closes, an applica-
tion may be made by a creditor to obtain further time for the
presentation of his claim.⁶¹

⁶¹ In re Hodges' Estate, 157
Mich. 198, 200 (1909); (9373), C.
L. 1897 as amended in 1901.

2289 Michigan, proof

State of Michigan,
The probate court for the county of
Estate of, deceased.
To Dr.

Address
State of Michigan, }
County of } ss.

..... being duly sworn says:
I reside in the of
The foregoing statement of account against the estate of
....., deceased, is a true and correct statement, and said
account is a just claim against said estate.

There is now due and unpaid on said claim, over and above
all legal set-offs, the sum of dollars.
Subscribed, etc.

| | | | | | |
|----------|--|---------------------------------|--|--|--|
| No. | State of Michigan Probate Court for the County of | Estate of Deceased. | Statement and Proof of Claim of | Filed, 19.. Register of Probate. | Allowed at the sum of \$..... as a claim of the class. Judge of Probate. |
|----------|--|---------------------------------|--|--|--|

2290 Mississippi

State of Mississippi, } ss.
..... county. }

Personally appeared before me,, clerk of the
chancery court of said county,
who made oath that the annexed claim is just, correct, and
owing from the deceased; that it is not usurious, and that
neither the affiant nor any other person has received payment in
whole or in part thereof, except such as is credited thereon, and
that security has not been received therefor.

Sworn to and subscribed before me this day of
....., 19..

....., Clerk.
By D. C.

State of Mississippi, } ss.
..... county. }
Chancery court.

Probated and allowed for \$. and registered this
..... day of, 19...

....., Clerk.
....., D. C.

2296 Judgment; allowance, classification

A claim against an estate can be classed as one of the sixth class under the Illinois statute, only when it arises from a technical trust; the statute has no application to trusts which the law implies and which grow out of contracts.⁶⁶

2297 Judgment; allowance, res judicata

The allowance of a claim by the county or probate court, which is subject to impeachment for fraud in a court of equity, is not conclusive against the heir on the hearing of an administrator's final report, and it may be set aside.⁶⁷

2298 Judgment; appeal, scope

For error in the allowance of a claim against an estate, in Illinois, an appeal lies to the circuit court, where a hearing is *de novo*.⁶⁸ An executor's or an administrator's appeal to the circuit court from an order disallowing a part of a single claim brings up the entire claim for review; but an appeal from an order disallowing one or more of separate and distinct items of a divisible claim brings up for review only such items as have been disallowed.⁶⁹

2299 Setting allowance aside, jurisdiction

The allowance of a claim may be set aside by the county or probate court at a subsequent term for fraud or mistake.⁷⁰

2300 Setting allowance aside, motion

An heir has the right to move to set aside an order of allowance of a claim against an estate which is, or which can be presumed to be, solvent.⁷¹

2301 Setting allowance aside, appeal

An order setting aside the allowance of a claim is interlocutory, and is not appealable.⁷²

⁶⁶ Felsenthal v. Kline, 214 Ill. 121, 123 (1905).

⁶⁷ Whittemore v. Coleman, 239 Ill. 450, 455, 456 (1909).

⁶⁸ Schlink v. Maxton, 153 Ill. 447, 454 (1894); Sec. 124, c. 3, Hurd's Stat. 1909, p. 134.

⁶⁹ Peterman v. United States Rubber Co., 221 Ill. 581, 588 (1906); Morgan v. Morgan, 83 Ill. 196, 197

(1876); Millard v. Harris, 119 Ill. 185, 191 (1887); Marshall v. Coleman, 187 Ill. 585.

⁷⁰ Schlink v. Maxton, 153 Ill. 449.

⁷¹ Schlink v. Maxton, 153 Ill. 452; Sec. 60, c. 3, Hurd's Stat. 1909, p. 123 (Ill.).

⁷² De Clerque v. Campbell, 231 Ill. 446.

2302 Release (Md.)

Know all men by these presents, that
of and state of
do hereby acknowledge to have received from
..... of the
sum of dollars and cents..
..... being the amount due from the distribution of the
estate of late
And in consideration thereof, do
hereby release, acquit, exonerate and discharge the said
..... heirs, executors and administrators of and from all
and every action, suit, claim or demand which could or might
possibly be brought, exhibited, or prosecuted against
them, or any of them, for or on account of
or the payment thereof, hereby declaring
satisfied, contented and paid as above specified.

Given under hand and seal this
day of in the year nineteen hundred and
Signed, sealed and delivered in the presence of

..... [Seal]
..... [Seal]

State of Maryland, to wit:

I hereby certify that on this day of
19.., before the subscriber of
said state, in and for said per-
sonally appeared part to the above release,
and acknowledged the same to be h.. act and deed. And I do
hereby certify that of my own personal knowledge I am satis-
fied that the said
who ha.. acknowledged the above release
the person named and described as and professing to be
....., the part.. in and to the same

SALE OF PERSONALTY

2303 Petition (D. C.)

The petition of, administrator respectfully
represents as follows:

1. That on the day of, 19..,
he was duly appointed administrator of the estate of the said
....., deceased, and has duly qualified as such, hav-
ing given bond in the sum of dollars.

2. That the personal estate of the deceased consisting of
..... is now stored at the of
at this city.

3. Your petitioner deems it to the best interests of the estate
that this property be sold at public auction as soon as possible
and thus stop the charges for storage thereon.

He therefore prays that he be authorized to at once advertise and sell the said property at public auction to the highest bidders at the auction rooms of; and that he be further authorized to pay the charges for storage, advertising, auctioneer's commission, and all other expenses incident to said sale. And he will ever pray.

.....,
Administrator.

(Verification)

2304 Order (D. C.)

Upon consideration of the petition of, administrator of the estate of, deceased, it is by the court this day of, 19.., ordered that the said, administrator, be and he is hereby authorized to advertise the (Describe property generally) belonging to the said estate and sell the same at public auction and to pay the charges for the advertising, the storage, commissioner's commission, and such other and reasonable charges incident to said sale.

(Maryland)

In the orphans' court for county.

It is this day of, 19.., ordered by the orphans' court for county, that of, late of said county, deceased, sell at public or private sale, all the personal property of the said deceased; and if said property, or any part thereof, be sold at public sale give at least ten days' public notice of the time, place, manner and terms of sale, which terms shall be, for all sums under dollars, cash; and all sums of dollars and upwards on a credit of six months, taking bond with good security from the day of sale; and if said property, or any part thereof, be sold at private sale, it shall not be sold for less than the appraisement thereof, unless further ordered by this court.

And it is further ordered, that the said return a full and particular account of the sales of said property, and of proceedings relative to such sale, immediately thereafter to this court.

....., C. J.
....., A. J.
....., A. J.

2305 Report on account of sale (D. C.)

..... and of
 of
 do solemnly swear that the annexed and foregoing is a just and
 true account of sales of the goods, chattels and
 personal estate of said, and that said
 sales were faithfully and fairly made, to the best of
 knowledge and belief.

.....
 Sworn to and subscribed before me this day of
, 19...

.....,
 Register of Wills for the District of Columbia,
 Clerk of the Probate Court.

(Maryland)

An account of the sales of such part of the personal estate of
, deceased, as was sold at public sale
 on the day of, 19...

| Articles sold | Name of purchasers | Amount |
|---------------|--------------------|--------|
| | | |
| | | |
| | | |

The subscriber hereby certifies, that he did sell by public
 sale for and on behalf of the of
, deceased, all the above described
 personal estate to the respective persons named in the above
 account of sales, they having been the highest bidders for the
 same.

Test:

.....,
 Auctioneer.

The undersigned,, of
 deceased, hereby return to the orphans' court of
 county the foregoing account of sales, which contains a full
 and particular account of the personal property and estate of
 the said deceased which was sold at public sale, in pursuance of
 their order of the day of, 19...; and
 ..he.. also report.. to the court that before ..he.. proceeded
 to make the said sale, ..he.. gave public notice thereof, and also
 of the time, place, manner and terms of sale by

Test:

.....

State of Maryland,
..... county, Set:

I hereby certify, that on the day of,
19.., before me personally appeared,
of, deceased, and made oath on the
Holy Evangely of Almighty God, that the matters and facts
contained in the foregoing report are true, as therein stated.

Test:

.....,
Register of Wills for County.

| | | | | | | |
|---|-------|----------------------|--|-------------------------------|-------|--|
| Account of Sales of Personal Estate of Deceased. | ===== | Filed, 19.. | Ratified by order of court this day of, 19.. | C. J. | ===== | Recorded in liber No. Folio |
|---|-------|----------------------|--|-------------------------------|-------|--|

SALE OR MORTGAGE OF REALTY

2306 Claims; nature, evidence

An application to sell real estate to pay debts can only be based upon regularly allowed and valid unpaid claims against the estate of a deceased person.⁷³ A claim which is regularly probated is binding upon the administrator and the heirs to the extent only of the personal property.⁷⁴ The court's approval of the payment of an improperly allowed claim is not binding upon the heirs upon an application for the sale of real estate.⁷⁵ The allowance of a claim filed after the expiration of the time that was allowed for the presentation of claims does not amount to a judgment, where no summons was issued to the administrator and he had not entered his appearance.⁷⁶ Upon an application to sell real estate, the regular allowance of a claim is merely *prima facie* evidence of its validity.⁷⁷

⁷³ Atherton v. Hughes, 249 Ill.
317, 327 (1911).
⁷⁴ Atherton v. Hughes, 249 Ill.
326.
⁷⁵ Atherton v. Hughes, 249 Ill.
329.

⁷⁶ Atherton v. Hughes, 249 Ill.
326; Sec. 61, Administration act
(Ill.).
⁷⁷ Atherton v. Hughes, *supra*.

2307 Claims, *res judicata*

The adjudication of claims upon a former application for the sale of real estate is *res judicata* in a subsequent similar application between the same parties involving the same claims.⁷⁸

2308 Setting fraudulent conveyance aside

An administrator stands in the place of the deceased with reference to his real estate and has no authority to institute proceedings to annul a conveyance which was made in fraud of creditors and at whose instance alone it is voidable, notwithstanding section 101 of the Administration act.⁷⁹ If, however, the deceased had right, title or claim to real estate at the time of his death, the administrator may petition the court for leave to sell the real estate, and the court may settle questions of conflicting or controverted titles and remove clouds.⁸⁰

2309 Jurisdiction

The circuit courts, in Illinois, have original jurisdiction of the appointment of trustees to sell real estate of deceased persons.⁸¹ The county court has general chancery powers and jurisdiction to pass upon the validity of incumbrances and liens, upon an application to sell real estate.⁸²

2310 Parties, administrator

An administrator has no authority to sell real estate; but, if charged by will with the duty to distribute the proceeds of real estate, he may file a petition for the appointment of a trustee to sell it.⁸³ An administrator *de bonis non*, but not an administrator *de bonis non* with the will annexed, may be appointed at the instance of a creditor to file a petition to sell a decedent's land for the payment of debts, where by reason of its possession and occupation by the widow as a homestead the land could not have been sold during the lifetime of the executor, and where nothing remains to be done under and by virtue of the provi-

⁷⁸ Atherton v. Hughes, *supra*.

⁷⁹ Hoyt v. Northup, 256 Ill. 604, 606 (1912); Sifford v. Cutler, 244 Ill. 234, 238 (1910); Sec. 101, Administration act as amended in 1887.

⁸⁰ Hoyt v. Northup, 256 Ill. 607; Sec. 10, Administration act (Ill.).

⁸¹ Frackelton v. Masters, 249 Ill.

35; Sec. 12, art. 6, Constitution 1870.

⁸² Clayton v. Clayton, 250 Ill. 433, 436 (1911); Sec. 101, Administration act.

⁸³ Frackelton v. Masters, 249 Ill. 33, 34.

sions of the will except to sell the land.⁸⁴ After the extinguishment of a homestead estate by the death of the widow of the deceased, it is the duty of an administrator to apply for an order, or in case of his death or removal, it is the duty of the court to appoint an administrator *de bonis non*, to sell the real estate that is subject to sale to pay unpaid approved claims against the estate and to settle the claims with the proceeds of the sale.⁸⁵

2311 Parties; executor, revocation of power

The power to sell real estate as an executor, and not as trustee by express appointment, is revoked by the proposed executor's failure to qualify.⁸⁶

PETITION

2312 Debts, sale to pay (D. C.)

In the supreme court of the District of Columbia,
Holding a probate court for said district.

| | |
|----------------------------|--------------------|
| In re estate of | } Probate No. |
| deceased. | |
|, administra- | |
| tor of the estate of | |
| deceased, petitioner, | |
| v. | |
|, heirs of | } |
|, deceased, | |
| defendants. | |

To the supreme court of the District of Columbia, holding a probate court for said district.

The petition of, administrator of the estate of, deceased, late of the city of, District of Columbia, respectfully represents as follows:

1. That heretofore, to wit, on the day of, 19.., upon the application of your petitioner, as one of the creditors of the above named decedent, your petitioner was appointed administrator of the estate of the said, and on the day of, 19.., he gave bond, and duly qualified as such administrator.

2. That he has filed an inventory and statement of money in hand, showing the personal assets of said estate that have come

⁸⁴ Frier v. Lowe, 232 Ill. 622, 624 (1908).

⁸⁵ Atherton v. Hughes, 249 Ill. 322.

⁸⁶ Frackelton v. Masters, 249 Ill. 34.

into his hands and to his knowledge to be money in the sum of dollars, being the money derived from the sale of the personal assets of the said decedent, said sale being duly authorized by the order of this honorable court; and your petitioner says and avers that there is no other personal property or estate of any description whatever left by said decedent which has come to his knowledge or possession after diligent inquiry.

3. That the said died in the city of, District of Columbia, on or about the day of, 19.., intestate, and your petitioner has been unable to ascertain whether the said decedent left surviving her a husband, and any heirs at law, or next of kin, although he has made diligent search to ascertain if any there be, and their respective whereabouts, and at best he has only been able to obtain vague and indefinite rumors that said decedent at one time was married and that she possibly may have had a sister or other next of kin, but your petitioner was unable to ascertain if they or any of them are still living, or anything in respect of their whereabouts; and that such husband, if any, and such heirs at law, if any, are living at the present time, are unknown to your petitioner, and their whereabouts is unknown to him.

4. That said was seized at the time of her death of one, and only one, piece of real estate situated and being in the District of Columbia, and known as and being lot (Describe same) in the county of, District of Columbia, as per plat recorded in the county book, page, in the surveyor's office for said district, subject to covenants running with the land; that (Give nature and effect of other covenants); and further subject to a deed of trust duly recorded in liber, folio, of the land records of the District of Columbia to secure dollars, upon which interest has been paid to, and to a deed of trust recorded among the land records of the District of Columbia, to secure the sum of dollars, of which there is balance due thereon with interest from; and from the best information which your petitioner is able to obtain, he would estimate the market value of said lands and premises to be about dollars.

5. That as far as your petitioner has been able to ascertain after diligent search and inquiry, the following are the only debts due or claimed to be due from the estate of the said decedent, together with the names and addresses of all of the creditors of said decedent, as far as known and unsecured (Give names and amounts).

6. That the amount or value of the personal estate or property of the said decedent is insufficient to discharge or pay the debts due from her estate, and that it is necessary to make sale of the real estate left by the said decedent, and hereinbefore

mentioned, for the purpose of paying said debts. That said real estate being only one piece and one lot, improved by (Describe improvement) is incapable of division, and must be sold as a whole.

Wherefore, the premises considered, your petitioner prays that the unknown husband, if living, and the unknown heirs at law and next of kin of the said, deceased, named herein as defendants, be made parties defendant to this petition or proceeding, and be summoned and required to answer this petition and the several matters and things therein set forth, and that process may be issued by summons or publication, or both, and in accordance with law against the said parties interested; that as the personal estate of the said decedent is insufficient to meet the costs of administration of the estate and pay the just debts due from the estate of said decedent, the petitioner be authorized and empowered to sell the real estate of which the decedent died seized and possessed, as in this petition described, for the payment of the costs of administration and debts over and above such a part thereof as may be paid, by the personal estate, and that the surplus, if any, remaining from the proceeds of sale of the real estate, to be distributed among the persons entitled thereto according to law; that all necessary and proper orders, references and decrees required in the case be passed, and made in accordance with law; and for all such other and further relief as may be necessary and proper in law and equity, in the judgment of the court.

....., Petitioner.
....., Attorney.
(Verification)

(Illinois)

To the honorable, judge of the court of county.

Your petitioner,, executor of the estate of, late of said county, deceased, respectfully represents:

That the said departed this life at, in said county, on or about the day of, 19...

That this petitioner was on the day of 19..., duly appointed by court of said county, executor of the estate of aforesaid, as will more fully appear by his letters testamentary reference being had thereunto.

That the inventory, appraisement bill, and sale bill, in said estate, have been duly filed in the office of the clerk of this court, and that the undersigned has rendered to said court a just and true account of the personal estate and debts of said deceased, a

certified copy of which account is hereto attached, and made part of this petition for reference and evidence, and marked exhibit "A."

That the personal estate of said , deceased, as appears from the aforesaid account and exhibit, amounts to dollars, besides doubtful and desperate claims, in the hands of this petitioner, amounting to dollars, of which he will probably collect or receive the sum of dollars.

That the debts and demands allowed against and the liabilities of the said estate amount to dollars, as will more particularly appear from said account, marked exhibit "A."

That this petitioner has applied all the proceeds of said personal estate which have come to his possession toward the payment of said debts, as by his account and vouchers on file in this court will more particularly appear, and that there is a deficiency of personal property to pay the debts of the said deceased.

And this petitioner further represents that the said died seized in fee of certain real estate in said county, described as follows, to wit: (Insert legal description) in township , north of range , in the county and state aforesaid subject to certain mortgages now past due and amounting to nearly dollars.

That by his last will and testament said gave petitioner a life estate in said land with remainder to his children whose names are , and that said will was duly admitted to probate in said court on or about , 19...

That the said deceased was never married and left him surviving no widow and no children, and that said is years of age and is years old, having no guardians resident in said county.

Therefore, in consideration of the premises, this petitioner prays that this court may appoint some discreet person as guardian *ad litem* for said minors to appear for them and defend their interest herein; that this court will order and direct this petitioner to sell the said real estate according to law, or so much thereof as may be necessary to pay the debts of said intestate; and that such further orders herein may be made as to this court may seem meet.

..... ,
 Executor of the estate of , deceased.

(Verification)

2313 Distribution, sale for (Mich.)

(Caption)
I,, respectfully represent that I am the of said estate; that the condition of said estate is as follows:

.....: that the description of all of the real estate of which said deceased died seized, and the condition and value of each parcel thereof, as I am informed and believe, are as follows:; and that the names, relationship, ages and residences of the heirs at law of said deceased, and other persons interested in said estate, as I am informed and believe, are as follows:

| Name | Relationship | Age | Residence |
|-------|--------------|-------|-----------|
| | | | |
| | | | |
| | | | |

I further represent that the condition and location of said real estate is such that it can not be partitioned without great injury to the value thereof, and that no one or more of the owners thereof are able and willing to have more than their respective portions of said real estate set off to them, and pay or secure to the others a proper compensation for what they receive more than their respective shares or portions; and that it is necessary and for the best interest of the persons interested in said estate that said real estate be sold for the purpose of distribution.

I therefore pray that I be authorized, empowered and licensed to sell, at sale, the interest of said estate in said real estate, for the purpose of distributing the proceeds of such sale among the persons entitled thereto.

.....
P. O.....

(Verification)

2314 Mortgage, authority to (Mich.)

(Caption)
I,, respectfully represent that I am the of said estate; that the personal estate of said deceased that has come into my hands amounts to the estimated value of dollars, of which there remains undisposed of property of the estimated value of dollars; that as far as can be ascertained, as I am informed and believe, the just debts outstanding against said estate amount to the sum of dollars; and that the charges and

expenses of administering said estate will amount to the sum of dollars.

I further represent that the description of all the real estate of which said deceased died seized, and the condition and value of each parcel thereof, as I am informed and believe, are as follows:

.....; that, as I am informed and believe, the income from said real estate, in its present condition will not exceed the sum of dollars per annum, which together with such residue of personal estate, is insufficient to pay said debts, charges and expenses and that it is necessary for the purpose of paying such debts, charges and expenses, to raise the sum of dollars, and I believe that it would be for the best interest of all persons interested in said estate to raise said sum by mortgaging said real estate.

I further represent that the names, relationship, ages and residences of the heirs at law of said deceased, as I am informed and believe, are as follows:

| Name | Relationship | Age | Residence |
|-------|--------------|-------|-----------|
| | | | |
| | | | |
| | | | |

I therefore pray that I be authorized, empowered and licensed to raise said sum by mortgaging the interest of said estate in said real estate, or such portion thereof as said court shall direct, for the purpose of paying said debts, charges and expenses.

.....
P. O.

(Verification)

2315 Trustee, appointment of (Ill.)

To the honorable judges of the circuit court of the county of in the state of Illinois.

Your petitioner,, as administrator with the will annexed of the estate of, would respectfully represent:

That on or about the day of, 19.., departed this life testate in the county of and state of Illinois, his last will and testament having been duly admitted to probate by the county court of county, Illinois.

That under and by the terms of said last will, a copy thereof being hereto attached and marked exhibit "A" and made a part of this petition, and from the files and records of the said county court, reference thereto being had, it will appear that were by said last will nominated by the said testator, as executors of the said last will; that

afterwards, on the day of, 19.., the said having filed their refusal to act as executors and having renounced all right and claim to exercise the duties of executors of said last will, as will more fully appear by said files in the office of the clerk of said county court, reference thereto being had, your petitioner was duly appointed administrator with the will annexed, as will more fully appear from the copy of the letters of administrator with the will annexed hereto attached and marked exhibit "B," and having filed bond and taken the oath as by law required, your petitioner entered upon his duties as said administrator with the will annexed, and that the said estate is in course of administration and some of the provisions of said last will are yet unexecuted.

That at the time of the decease of the said testator he was a member of a co-partnership composed of the said and his son, the said for the purpose of agricultural pursuits; that the said co-partnership has been wound up and settled by the said as surviving partner; that the net proceeds have been turned over by the said to your petitioner, amounting to the sum of dollars; that personal property to the value of dollars came to the possession of your petitioner, which was delivered to the widow of the said in kind, as her award, said widow having filed her written release to the remainder of the award set off to her by the appraisers of said estate, as is shown by their report herein, making the total items of receipt by your petitioner of the sum of dollars; and that your petitioner has paid out the sum of dollars, leaving a balance in the hands of your petitioner of dollars, as is shown by his report, a copy thereof being hereto attached and marked exhibit "C," and made a part of this petition.

That on the day of, 19.., the said filed his certain bill in chancery in the circuit court of the said county and state to set aside the said will of the said; that said bill was dismissed upon the parties in interest entering into a certain stipulation and filed of record in said cause, as will more fully appear by reference to said files and records in the office of the clerk of the circuit court of said county, wherein, among other provisions, the said was to be paid the sum of dollars and the heirs of were to be paid the sums of dollars out of the shares of, from the sale of certain real estate willed to be sold upon the death of, wife of said; that said sums, as per said stipulation, have never been paid and are still owing to the said

That on or about the day of, 19.., the said widow of the deceased, aforesaid, departed this life in said county, intestate, as shown by the affidavit of deceased filed in the office of the clerk of the

county court of said county by said, and that has been appointed administrator of the estate of the said deceased, as will more fully appear from the files and the records of the said clerk of the said county court.

That under and by the terms of said last will of the said, his executors were directed and authorized to sell certain lands, the authorization being set forth in the clause of said will as follows (Insert clause); and that the lands so directed to be sold are described as follows: (Insert legal description). All in the county of and in the state of Illinois.

That since the filing of the report of his acts and doings marked exhibit "C" herein, this petitioner has paid to the sum of dollars as an attorney's fee and retainer in the above mentioned cause to set aside said last will of the said; that all the assets of said estate have been collected by your petitioner and that there are no more to be obtained from any source except the sale of the said above described lands, which by said last will were directed to be sold by the said executors; that the legacy of dollars in said last will bequeathed to has not been paid because there was not sufficient moneys wherewith to pay the same.

That under the terms of said last will of the said the lands above described may now be sold, but that by reason of the refusal of the executors to accept the trust, there is no one who can sell said lands and carry into effect said will and its provisions without an application to this court for an enabling order or decree directing the manner in which the said last will and its provisions may be made effectual as is by law required.

Your petitioner therefore prays the aid of this court in the premises and that a writ of summons may issue out of and under the seal of this court, commanding the said who are made parties defendants hereto, to personally appear before this court, on the day of the next term thereof, to be held at the court house in, Illinois, in the county of, on the in, 19. ., and then and there full, true, direct and perfect answer make (but not under oath, answer under oath being hereby expressly waived), to all and singular the matters herein stated, and to stand to and abide by the order of this court in the premises; and that upon a hearing hereof, a decree may be made by this court that your petitioner be appointed trustee to sell the said above described lands, that he be authorized to execute good and sufficient deed or deeds of conveyance, that he be empowered to carry into effect the said last will and testament of the said in the manner and according to its terms and provisions and according to the law in such

case made and provided; and that your petitioner may have such other and further relief in the premises as equity may require and to the court may seem meet.

.....
Petitioner.

.....
Attorney for petitioner.

(Verification)

2316 Summons (Ill.)

(Venue)

The people of the state of Illinois, to the sheriff of said county, greeting:

We command you, that you summon if they shall be found in your county, personally to be and appear before the court of said county, on the day of the next term thereof, to be holden at the court house in in said county, on the Monday of, 19.., to answer unto the petition of executor of the estate of, deceased, on the return hereof, which said petition was filed in our court, on the day of, 19.., and prays that this court will order and direct the sale of the real estate of said deceased.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, etc.

2317 Notice, waiver and consent (Mich.)

State of Michigan, }
..... county. } ss.

In the matter of the estate of, deceased.
To the probate court for said county:

The undersigned, being of said deceased, do hereby waive notice of hearing on the within and foregoing petition for authority to sell the real estate therein described, and we do hereby consent to the sale of said real estate for the purposes and in the manner as prayed in said petition.

Dated, etc.

.....
.....
.....

2318 Publication, order (D. C.)

(Caption)

The object of this suit is to sell lot number
 (Describe same) in the county of, District of
 Columbia to pay debts due by the said,
 deceased, said property having been owned by her in her life
 time, and there not being sufficient personal property to pay
 said debts. On motion of the complainant it is this
 day of, 19.., ordered that the defendants, the
 unknown husband, if living, and the unknown heirs at law of
 cause their appearance to be entered herein, on or
 before the rule day occurring after the expira-
 tion of three months from the date of the first publication of
 this order, otherwise, the cause will be proceeded with as in
 case of default; provided a copy of this order be published
 twice a month for three months in the and
 newspapers, before said day.

By the court,

..... Justice.

(Michigan)

(Caption)

In the matter of the estate of
 having filed in said court petition, praying for
 license to the interest of said estate in certain
 real estate therein described

It is ordered, that the day of,
 19.., at ten o'clock in the forenoon, at said probate office, be
 and is hereby appointed for hearing said petition, and that
 all persons interested in said estate appear before
 said court, at said time and place, to show cause why a license
 to the interest of said estate in said real estate
 should not be granted;

It is further ordered, that public notice thereof be given by
 publication of a copy of this order, for three successive weeks
 previous to said day of hearing, in the
 a newspaper printed and circulated in said county.

..... Judge of Probate.

2319 Publication; service, mailing, affidavit (D. C.)

(Caption)

I, on oath say that I am the attorney for the
 petitioner in the above cause, administrator of
 the estate of the above named; that I have
 made diligent search to ascertain, if there is a husband living
 of said and his last known place of residence, if

living, and I have also made diligent search to ascertain if there are any heirs at law of said and if any, their names, and last known places of residence; that I have been unable to ascertain the name, if living, of such husband, if there be one, or his last known place of residence, and I have been unable to ascertain the name or names of any heirs at law, if there be any, of said or their last known place of residence, if they have any such. For the reason above and herein stated, I have been unable to mail post paid a copy of the order of publication to such husband, if any, or to such heirs at law, if any.

.....

Subscribed, etc.

2320 Default and reference, order (D. C.)

Upon consideration of the petition filed herein by administrator of the estate of the above named deceased alleging a deficiency of personal property of said estate for the payment of debts due therefrom, and praying for authority to sell real estate described in the petition for payment of said debts, and it appearing to the court that after due publication, there has been no appearance or answer filed for or on behalf of any or all the unknown husband, if living, and the unknown heirs at law, if living, or any of the above named, it is by the court, this day of, 19.., ordered, adjudged and decreed that said cause be and the same hereby is taken *pro confesso* against such unknown husband if any, and against such unknown heirs at law, if any; and it is further ordered, adjudged and decreed that the above cause, the petition filed herein and all answers, if any, and papers filed and all proceedings heretofore had in this cause, be and they hereby are referred to the auditor of the court to ascertain and report said debts and legacies, if any, chargeable upon said real estate, the deficiency of personal estate, if there be such, and the real estate necessary to be sold for the payment of the debts, legacies and claims if any.

2321 Defenses, devastavit

An heir may defeat an application for the sale of real estate which is sought for the purpose of making good a *devastavit* or the loss of a fund that has occurred through the administrator's negligence or mismanagement of the estate.⁸⁷

⁸⁷ Atherton v. Hughes, 249 Ill. 328.

2322 Defenses; dower, ante-nuptial contract

Parties to an ante-nuptial contract occupy a confidential relation towards each other, requiring a full disclosure and knowledge of the nature, the character and the amount or value of their property, and such a contract is valid only, if at the time of its execution, the parties possess the requisite knowledge, or the circumstances are such that they ought to have had such knowledge. The burden of showing this knowledge, or such circumstances, is upon the party who claims under the instrument.⁸⁸

2323 Defenses; unrecorded deed, delivery

The delivery to a third person of a voluntary conveyance for safe keeping until the grantor's death and to be thereafter recorded or kept for the grantee, passes title to the grantee, where the circumstances show the grantor's intention to have been that the conveyance should pass beyond his control.⁸⁹

2324 Order of sale (D. C.)

This cause coming on for hearing at this term upon the pleadings, papers and proceedings, and the report of the auditor filed herein on the day of, 19.., from which it appears to the satisfaction of the court that a sale of the real estate of which the above named died seized, for the purpose of paying debts and claims against her estate is necessary, it is this day of, 19.., ordered, adjudged and decreed that the said report of the auditor be and the same is hereby confirmed, and that the real estate mentioned and described in the petition filed by the administrator for the sale and the said report of the auditor as follows: (Describe property) in the county of District of Columbia as per plat recorded in county book page in the surveyor's office of said district, subject to covenants running with the land, (Give nature and effect of other covenants), be sold at public auction, unless the court for good cause shall hereafter direct a private sale; that administrator of said estate be and he hereby is authorized to make sale, after first advertising the same in the, a newspaper of District of Columbia in accordance with equity rule number 74 of this court; and that the course and manner of said administrator's proceedings under this order or decree

⁸⁸ *Mines v. Phee*, 254 Ill. 60, 61 (1912).

⁸⁹ *Hoyt v. Northup*, 256 Ill. 609.

shall be in accordance with the provisions and requirements of said rule No. 74. It is further ordered, adjudged and decreed that said administrator, before making said sale shall give bond to the United States (in addition to his administrator's bond already given) with surety to be approved by the court in the penal sum of dollars conditioned as by law is provided in case of the sale of real estate by an administrator to pay debts of the decedent and claims against said decedent's estate.

(Illinois)

(Caption)

And now comes the petitioner by his solicitor and presents his petition herein, and it satisfactorily appearing to the court that the defendants above named have all been duly served with summons herein by the sheriff of county, more than ten days prior to the first day of the present term of court, that the said defendants are minors and have no guardian, and having been appointed by this court as guardian *ad litem* for said minors; and afterwards, the said as such guardian comes and files his answer herein, neither admitting nor denying the allegations in said petition contained, but reserving the rights of said minors by requiring proof. And this cause having been brought on to be heard upon the petition herein, and the answer of said guardian *ad litem* and the exhibits and proofs; and it satisfactorily appearing to the court from the evidence that the said departed this life on or about the day of, 19.., leaving no widow and no children, and by his last will devised all of his property to petitioner for life, remainder to said defendants in fee; that the petitioner herein was duly appointed executor by the said will of said, deceased, and that letters testamentary were duly granted to him by this court; and the court having ascertained that said petitioner as aforesaid has made to this court a just and true account of the condition of the estate of said deceased, and that the personal estate of said deceased is not sufficient for the payment of the debts of the said deceased; and the court having found the amount of the deficiency aforesaid to be the sum of about dollars, besides interest and costs; and it further appearing to the court that the said died seized of the following described real estate, situate in the county of and state of Illinois, to wit: (Set forth description of property), subject to several mortgages thereon.

And the court having ascertained that it will be necessary to sell all of the said real estate to pay the deficiency aforesaid, with the expense of administration now due and to accrue;

it is therefore ordered, adjudged, and decreed that the said petitioner proceed, according to law, to advertise and make sale of the real estate above described, or so much thereof as may be necessary to pay the debts now due from said estate, and the costs of administration now due and to accrue; and it is ordered and decreed by the court, that said sale shall be made on the following terms, viz.: cash on the day of sale subject to the mortgages thereon, which terms shall be distinctly set forth in all the advertisements of said sale. It is further ordered that upon such a sale being made, that said make and execute to the purchaser or purchasers of said real estate, good and sufficient deed or deeds to convey the interest of said deceased therein at the time of his decease, and that said report his action in the premises with all convenient speed. And it is further ordered that this cause stand continued for said report.

2325 Notice of sale (Ill.)

Executor's sale

By virtue of a decretal order of the county court of county, rendered at the term, 19.., of said court, I shall at public sale sell for cash, subject to certain mortgages thereon, the following real estate, situate in said county, to wit: (Describe real estate).

That I shall make said sale at door of the court house in the city of in said county, on the day of, 19.., at the hour of .. o'clock .. M. of that day. The purchaser will receive a deed on such purchase by complying with the terms of such sale.

.....

 Executor of the estate of, deceased.
 solicitor.

(Maryland)

Executor's sale of (Insert short and attractive description of property).

In exercise of the power conferred upon it by the will of, deceased, the undersigned will sell at public auction on the premises, on, 19.., at .. M., the lot of ground at the southwest corner of and streets, having a frontage on street of about feet, with depth on street of about feet, to alley, in fee simple, with the dwelling thereon, known as No. street. This property being opposite offers an

excellent opportunity as a site for a store or other business purposes.

Terms of sale: one-half cash, balance in months, or all cash at option of purchaser. A deposit of \$. required of purchaser at time of sale. Expenses to be adjusted to date of ratification of sale.

.....
 Executor.

 Auctioneers.

2326 Publisher's certificate (Md.)

....., 19..

We hereby certify that the annexed advertisement of order *nisi* orphans' court of estate of, deceased, was published in, a daily newspaper published in the city of, once a week for three successive weeks before the day of, 19..

First insertion, 19..

.....
 By

(Attach copy of order *nisi* published.)

REPORT OF SALE

2327 Illinois, filing

The report of sale should be filed on or before the first day of the term next succeeding the sale; or, it may be filed at a subsequent date and approved by the court upon notice given to the parties interested.⁹⁰

2328 Illinois, report

To the honorable judge of said court.

The undersigned, executor of the estate of deceased, would hereby report that, by virtue of the decree theretofore entered in this court in the above entitled cause, he did, on the day of, 19.., between the hours of o'clock in the forenoon and five o'clock in the afternoon of said day, at the door of the court house in in said county, in the state of Illinois, offer for sale at public vendue the real estate described in said decree, and bid the sum of dollars for

⁹⁰ Verdun v. Barr, 253 Ill. 120, 127 (1912); Par. 108, c. 3, Hurd's Stat. 1909.

(Describe portion of real estate covered by bid) and
 bid for all of the other land described in said decree the
 sum of dollars, and the said being
 the highest and best bidders for said described real estate, the
 same was struck off to each of them at the sums aforesaid, and
 as the executor of, deceased, I executed and
 delivered to each of them a deed for said real estate, so pur-
 chased by each.

And I further report that, previous to making said sale, I
 caused a notice, of which the annexed is a true copy, to be pub-
 lished for successive weeks, in the,
 a weekly newspaper published at, in said county,
 where said real estate is situated, and also posted up similar
 notices in (four) of the most public places in said county
 weeks previous to said day of sale.

I further report that said purchasers paid to me, on the day
 of the said sale, the sum of their bids in cash.

All of which is respectfully submitted.

Dated, etc.

(Attach notice of sale)

2329 Illinois, order approving

On this day comes executor of the estate of
 deceased, and presents his report of sale of real estate
 under the decree rendered at the term of this court,
 in the above entitled cause, which said report is examined, and
 being found correct, and no objections being made to the ap-
 proval thereof, is hereby approved and ordered recorded. And
 it is further ordered that said sale be and the same is hereby
 confirmed.

2330 Maryland, report

To the honorable, the judges of said court.

The report of sale of the company of
, executor of, deceased, respectfully
 shows:

That in the settlement of the estate of said deceased it will
 be necessary to sell the property hereinafter mentioned, and
 in the exercise of the power conferred upon it by the will of
 said deceased, it did, after having given due notice by adver-
 tisement in and of the man-
 ner, time, place and terms of sale, attend on the premises on
, 19.., and then and there sold
 at public auction, all that lot of ground, together with the
 improvements thereon, known as No. street,
 as shown on the plat hereto annexed, which was exhibited at
 the sale, to, at and for the sum of
 dollars (\$.) upon the terms mentioned in the copy of the

advertisement hereto annexed, he being the highest bidder therefor.

Wherefore, it prays your honors to ratify and approve said sale.

And as in duty bound, etc.

.....
Executor.

By
Assistant Secretary.

Amount of sale \$.....

State of Maryland, to wit:

I hereby certify that on this day of, 19..., before me the subscriber, a notary public of said state in and for said city, personally appeared, assistant secretary of the company of, executor as aforesaid, and made oath in due form of law that the matters and facts set forth in the foregoing report of sale are true as therein stated and that the sale was fairly and *bona fide* made.

.....
Notary Public.

2331 Maryland, order nisi

In the orphans' court of

....., 19..

Ordered, that the sale of the real estate of, deceased, made by company of, the executor of the last will and testament of the said deceased, and this day reported to this court, by the said executor, be ratified and confirmed, unless cause be shown to the contrary on or before the day of, 19..

Provided, a copy of this order be inserted in some daily newspaper published in the city of, at least once a week, for three successive weeks, before said day of, 19..

The report states the amount of sale to be \$.....

.....
.....
.....

2332 Maryland, exceptions

To the honorable, the judges of said court.

....., by, his attorney, respectfully excepts to the ratification by this honorable court of the sale reported in the above entitled matter on, 19.., by the company, executor of the above estate. For that the title to the property embraced in said report of sale is not good and marketable, because: (State reasons).

And for other reasons to be assigned at the hearing.

Wherefore, your petitioner prays to be discharged from the obligation of said sale.

And as in duty, etc.

.....
Attorney for exceptant.

2333 Maryland, order ratifying

The matter of the exceptions of to the final ratification of the sale of certain real estate made and reported to him by the company of
....., executor of the last will of having been heard and argued by counsel for the exceptant and the executor, it is ordered by the court this day of, 19.., that the exceptions of the said exceptant be and the same are hereby dismissed with costs, and the said sale be and the same is hereby ratified and confirmed.

.....
.....
.....

2334 Michigan, report

I,, of said estate, hereby respectfully report my proceedings on the sale of the interest of said estate in certain real estate which I was licensed to sell by an order of said court, made on the day of, 19..

In pursuance of said order, I gave a bond with sufficient sureties, which was duly approved, and took and subscribed the oath before sale, as required by law, which have been duly filed in said court, and on the day of, 19.. I sold at private sale the interest of said estate in the following described real estate, to wit:
to for the sum of dollars, that being highest price obtainable therefor and not less than the value thereof as determined by said court.

I therefore pray that the proceedings on the sale of said real estate be confirmed.

.....
P. O.

(Verification)

2335 Michigan, order confirming

License to sell the interest of said estate in certain real estate having been, on the day of, 19.., by an order of said court, duly granted to of said estate, and a certified copy of said order having been delivered to said

.....; and having previous to said sale given bond as in said order directed, which has been duly approved, and taken and subscribed an oath, as required by law, which have been duly filed in said court, and having on the day of 19.., filed in said court a report of proceedings upon said order, and eight days having elapsed since the filing of said report; it appearing to the court that the interest of said estate in the following described real estate, to wit: was on the day of, sold to for the sum of dollars; it further appearing, after a full examination of all the proceedings, that said sale was legally made and fairly conducted, and that the price obtained for the interest of said estate in said real estate is not disproportionate to the value thereof and not less than the value heretofore determined by said court, and that said sale ought to be confirmed; it is ordered, that said sale be and is hereby confirmed, and that a conveyance of said real estate be made to the purchaser thereof.

.....
Judge of Probate.

2336 Appeal, jurisdiction

In a proceeding to sell lands to pay debts of an estate no freehold is involved if the only controversy is whether the land is subject to the payment of such debts.⁹¹

2337 Appeal, notice (Md.)

Mr. Register:

Please enter an appeal on behalf of, purchaser, from the order of court in the above entitled matter, passed on the day of, 19.., dismissing the exceptions of said, and ratifying and confirming the sale therein mentioned.

.....
Attorneys for

2338 Setting sale aside

A sale which has been made indirectly to an executor or administrator is voidable, not void; and proceedings to set the sale aside must be instituted in apt time, or it will be regarded as having been ratified.⁹²

⁹¹ Thomas v. Waters, 213 Ill. 141 (1904); Wachsmuth v. Pennsylvania Mutual Life Ins. Co., 231 Ill. 29, 31 (1907).

⁹² Verdun v. Barr, 253 Ill. 130.

WIDOW'S AWARD

2339 Petition (Ill.)

To the honorable, judge of said court.

The petition of, widow of the said deceased, respectfully represents unto your honor that your petitioner and were married in, at the town of, county of, and that the marriage relation existed between them until, 19., when the said died, seized of certain property, from which your petitioner respectfully prays that the widow's award in said estate be paid to her, your petitioner.

.....
Petitioner.

(Verification)

(Michigan)

....., respectfully represent that I reside in the of in said county, and am interested in said estate and make this petition as widow of said deceased; and that the personal property belonging to said estate amounts, according to the inventory of the same on file in said court, to the sum of dollars, exclusive of household furniture, ornaments and wearing apparel. I hereby select the following articles from the said inventory, at their appraised value, to the amount of two hundred dollars, to wit:

I further represent that the annual income from the real estate of said deceased will amount to the sum of dollars, or thereabout, and the indebtedness of said deceased amounts to the sum of dollars, or thereabout; that I am of the age of years and that the family of said deceased consists of the following persons dependent upon said estate for support, to wit: aged.....years
..... aged.....years

I therefore pray that said household furniture, ornaments and wearing apparel, and the personal property hereinbefore selected, be assigned to me, and that I be allowed the sum of dollars per week for the maintenance of myself and the family of said deceased.

(Verification)

I,, of said estate, do hereby accept due notice of the hearing on the foregoing petition and consent to the granting of the allowances therein prayed for without further notice thereof.

Dated, etc.

.....
.....

2340 Appraisement (Ill.)

Appraiser's estimate
of the value of property allowed to the widow.

.....
We, the undersigned appraisers, appointed by the judge of
the probate court of county, in the state of
Illinois, to appraise the value of goods, chattels, and personal
estate of, deceased, do hereby make and certify
to said court the following estimate of the value of each article
of specified property allowed by law to the widow, for herself
and family, to wit:

Dollars Cents

The family pictures and wearing apparel, jewels
and ornaments of the widow and minor chil-
dren
School books and family library.....
One sewing machine
Necessary beds, bedsteads and bedding for widow
and family
The stoves and pipes used in the family, with
necessary cooking utensils (or in case they have
none, \$50.00 in money)
Household and kitchen furniture.....
One milch cow and calf (being one for every four
members of the family)
Four sheep and fleece (being two for each member
of the family)
One horse, saddle and bridle
Provisions for the widow and family for one year
Food for stock above specified for six months..
Fuel for widow and family for three months....
Other property

Total

Given under our hands this day of,
19...

.....
.....
.....

Appraisers.

Approved in open court, 19...

.....
Judge Probate court,county,
Illinois.

2341 Order (Ill.)

This cause coming on to be heard upon the final hearing on the petition of, heretofore filed herein, asking that distribution be made to her of the award set-off in the estate of, deceased, and the cross-petition of, heretofore filed thereto; and said cause having been continued from time to time, and all parties being present in open court; and the court having heard the evidence adduced, and being fully advised in the premises, it is ordered that the prayer of the petition of said be granted and that distribution of said widow's award be made to her within five days from this date.

And thereupon the said prayed an appeal to the circuit court of county, which is granted upon condition that she file her appeal bond herein in the penal sum of dollars, with good and sufficient surety, to be approved by this court, within days from this date.

(Michigan)

..... having been appointed for hearing the petition of the widow of said deceased, praying for the assignment to her of her statutory allowances out of said estate, and due notice of the hearing on said petition having been given to the of said estate, the said petitioner appeared

It is ordered, that said widow be allowed the personal property of said deceased selected by her not exceeding in value the sum of two hundred dollars, to wit: (Describe same); and also all her articles of apparel and ornaments, and all of the wearing apparel and ornaments, and the household furniture of the said deceased.

It is further ordered, that an allowance of the sum of dollars per week be and is hereby granted, out of the personal estate and the income of the real estate of said deceased, for the support and maintenance of the widow and the children constituting the family of said deceased, for one year from the date of the death of said deceased

.....,
Judge of Probate.

2342 Appeal, jurisdiction

The supreme court, in Illinois, has jurisdiction on appeal or error to review a judgment rendered in a proceeding brought

for the purpose of setting off the widow's award, although the amount involved is undetermined; because, such a proceeding is not in the nature of an *ex contractu* action.⁹³

2343 Appeal bond (Ill.)

Know all men by these presents, that we executrix of the estate of, deceased, and of the county of, and state of Illinois, are held and firmly bound unto also of the same county and state, in the penal sum of dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly, by these presents.

Witness our hands and seals, this day of , 19...

The condition of above obligation is such, that whereas, the probate court of county, Illinois, did on the day of, 19..., and of the term thereof, 19..., enter an order that said estate of , deceased, pay to said the sum of dollars, said sum being the widows' award heretofore assigned, from which said order of the said probate court of county, the above bounden, executrix, etc., has prayed for and obtained an appeal to the circuit court of said county.

Now, therefore, if the said, executrix, etc., shall duly prosecute her said appeal with effect, and, moreover, pay, in the due course of administration of said estate the amount of the judgment, costs, interest and damages rendered and to be rendered against said estate in case said judgment shall be affirmed in said circuit court, then the above obligation to be void; otherwise to remain in full force and virtue.

..... [Seal]
 Executrix estate of deceased.
 (residence)
 [Seal]
 (residence)

Approved in open court, 19...

 Probate Judge of county, Illinois.

ACCOUNTS

2344 Jurisdiction, partnership

County or probate courts of Illinois have equity jurisdiction in the adjustment of administrators' and guardians' accounts.⁹⁴

⁹³ Kroell v. Kroell, 219 Ill. 105, 111 (1905).

⁹⁴ Whittemore v. Coleman, 239 Ill. 456.

These courts have also power to preserve partnership property until an accounting is had, and to require an accounting; but this power does not extend to the ordering of a further accounting where one has been made with the personal representative of a deceased partner, in the absence of fraud or mistake in the accounting or settlement.⁹⁵

2345 Partnership

The adjustment of the affairs of a dissolved partnership between the personal representatives of a deceased partner and the surviving partners is conclusive upon the parties and all persons who claim through them, in the absence of fraud or mistake in the settlement.⁹⁶

2346 Pleading, nature

The settlement of estates of deceased persons is in the nature of a summary proceeding in which the pleadings should conform more to pleadings in chancery than those at common law; but they need not follow strictly either.⁹⁷

2347 Amendment

A partial or annual account of an executor or administrator is open to subsequent correction and challenge, because it is usually an *ex parte* proceeding and is only a judgment *de bene esse* and *prima facie* correct.⁹⁸

COMPELLING ACCOUNTING

2348 Petition (Md.)

To the honorable, the judges of said court.

This petition of, respectfully shows:

1. That he is a son of, deceased, and as such is a distributee and entitled to an interest in the personal estate of said decedent.

2. That is one of the administrators of, deceased, and as such has filed a list of debts due his decedent.

⁹⁵ Andrews v. Stinson, 254 Ill. 127; Secs. 87, 90, Administration act (Hurd's Stat. 1909, pp. 127, 128).

⁹⁶ Andrews v. Stinson, 254 Ill. 125.

⁹⁷ Andrews v. Stinson, 254 Ill. 127.

⁹⁸ Reizer v. Mertz, 223 Ill. 555 (1906).

3. That the said is indebted unto the estate of said decedent in the sum of dollars and interest thereon from, and the said is also indebted unto the estate of said decedent in the sum of dollars and interest thereon from, and has not given in such claims in the list of debts due the decedent heretofore filed by him in this court.

Wherefore, this petitioner prays that the said may be required to give in said claims in his list of debts as administrator; that this honorable court may pass an order requiring him to file in this court his answer to this petition on or before some certain day to be named therein; and that upon the filing of said answer issues arising out of the foregoing petition and said answer shall be framed by this honorable court and sent to the circuit court for county for trial.

Respectfully submitted,

.....

Attorney:

.....

2349 Order (Md.)

The foregoing petition having been read and considered, it is thereupon this day of, 19.., ordered by the orphans' court of county, that administrator, be and he is hereby required to file his answer to the foregoing petition on or before the day of, 19..; provided, a copy of this order be served upon the said or his solicitor on or before the day of, 19..

(Three signatures)

Judges of the orphans' court.

Service of the above order made upon and copy of same left with me this day of, 19..

.....
Solicitor for

2350 Answer, necessity

Under Maryland's practice, an answer to the petition to compel an accounting is necessary, although the statute does not require it.⁹⁹

⁹⁹ Long v. Long, 115 Md. 130 (1911).

2351 Answer (Md.)

To the honorable, the judges of said court.

The answer of, as one of the administrators of the estate of, and in his individual capacity, to the petition of, heretofore filed in this court against him.

This respondent admits that the said is the son of and as such is a distributee and entitled to an interest in the personal estate of said decedent.

He also admits that he is one of the administrators of the personal estate of the said, and as such, in conjunction with and, administrators, has filed a list of debts due the estate of said decedent.

This respondent denies that he is indebted to the estate of said decedent in the sum of dollars with interest from, 19.., and he also denies that he is indebted to the estate of said decedent in the sum of dollars with interest from, 19..; and this respondent further says that he did not give in said alleged claims, as administrator, in the list of debts due the decedent for the reason that there were no such claims, or any evidence of the same among the papers and effects of the said decedent, and that such alleged claims, having no foundation in fact, could not be returned as part of the estate of said decedent.

This respondent further says that so far as his knowledge, information and belief go, there has been a full and complete return of all the debts due the estate of said decedent, as will appear by the returns made in this court by this respondent and his associates and

This respondent asks that the petition of the said be dismissed and that he be allowed his reasonable costs in this behalf sustained.

And as in duty, etc.

.....
..... Solicitor.

(Venue)

I hereby certify that on this day of, 19.., before me, the subscriber, a notary public of the state of, in and for county, personally appeared the above named who, as administrator of the estate of, deceased, and in his individual capacity, made oath in due form of law that the matters and things set forth in the foregoing answer are true to the best of his knowledge, information and belief.

In witness whereof, I have hereunto set my hand and affixed my notarial seal the day and year first above written.

[Notarial seal] Notary Public.
My commission expires, 19..

2352 Replication (Md.)

¹⁰⁰ In the matter of the petition of filed in the above entitled cause on, and the answer of thereto, the aforesaid now comes into court and says, that he will aver and prove the said petition to be true and sufficient; and that said answer, in all things, except wherein it admits the allegations of said petition, is untrue and insufficient, as he is and will be ready to prove, and prays as in said petition he has already prayed.

.....
Solicitor for petitioner.

2353 Issues, petition (Md.)

To the honorable, the judges of said court.

This petition of respectfully shows:

That the answer of, one of the administrators, of said of, deceased, has been filed to the petition of alleging that the said is indebted to the estate of said decedent and has not included the same in the list of debts filed by him as administrator.

That your petitioner is advised that he is entitled to have the issues of facts raised as to the matter of said petition and answer to be tried and determined by a jury as preliminary questions; and he therefore prays that issues may be transmitted to the circuit court for trial.

And the said petitioner, proposes the following issue and prays the court to grant the same and order it to be sent to the circuit court for county for trial.

I

Is indebted to the estate of of deceased; if so, how much?

.....
Solicitors for petitioners.¹⁰⁰

¹⁰⁰ No formal replication is required by statute. Any step of the petitioner which shows that he denies the material allegations of the answer and takes issue thereon is

equivalent to a replication. The following petition was considered good as a replication. *Long v. Long, supra.*

In account with Cr.
of the estate of.....deceased.

..... } The said administrat
Term, 19.... } charge sel with
the following receipts had byh.... in
behalf of said estate, to wit:

| When received | Of whom received | On what account | Amount |
|---------------|------------------|-----------------|--------|
| | | | |
| | | | |
| | | | |

No.
Administat..
..... account.
Estate of,
deceased.
In the chancery court of
..... county.
.....
.....
Administat..
Filed, etc.
Approved and allowed
..... term, 19..
.....

FINAL ACCOUNT

2356 Attorney's fees

An administrator who performs services as a lawyer for the estate is not entitled to attorney's fees.¹⁰¹

2357 Compensation to administer, notice

No compensation should be awarded an administrator who is guilty of flagrant disregard of duty.¹⁰² It is not necessary, under Illinois statute, to give notice to the widow, heirs and legatees, of a motion to fix fees of an executor or an administrator.¹⁰³

¹⁰¹ Whittemore v. Coleman, 239 Ill. 455.
¹⁰² Whittemore v. Coleman, *supra*.
¹⁰³ Griswold v. Smith, 221 Ill. 341, 348 (1906).

2358 District of Columbia

In the supreme court of the District of Columbia,
Holding probate court.

Estate of } No.....
Deceased. } Administration Docket....

Date of death.....19....

Final account of
.....

| 19 | (Letters issued.....) (Date) | Assets Received | Disbursements |
|----|---|-----------------|---------------|
| | <p>This accountant charges himself with the amount of the inventory of appraised personal estate filed hereinrecorded in liber of inventories No..... folio....., consisting in household effects appraised Jewelry, appraised..... Books, appraised.....</p> <p>And with inventory of money filed.....recorded in liber of inventories No.....folio....., consisting in proceeds of policy of life insurance No.....</p> <p>She claims credit and allowance for the following disbursements, to wit:cemetery, Vou. 1,.... (Continue with all other items in same way) Balance.....</p> <p>Balance down Distribution according to law as follows, to wit: To widow To guardian number of minor son Totals</p> | | |

District of Columbia, to wit:

I, the undersigned,, execut.. of the will of, late of the, deceased, do solemnly swear that the foregoing account is just and true, and

2360 Illinois, first and final

(Caption)

Said administrator charges himself with the following by him received on behalf of said estate (Give itemized statement).

.....
Administrator as aforesaid.

(Venue)

..... being first duly sworn, deposes and says that the foregoing final account by him subscribed as administrator of the estate of, deceased, is just and true; and further deponent saith not.

Subscribed, etc.

2361 Michigan

To the honorable, judge of probate for said county.

The undersigned of the of said deceased, hereby submits final account as follows:

| | Dollars. | Cts. |
|---|----------|-------|
| Total value of real estate, as per inventory on file | | |
| Total value of personal estate, as per inventory on file | | |
| Total value of personal estate received since date of inventory | | |

On account of which ..he.. charges and credits h....self, as follows, to wit:

| Debits: | | | | |
|----------|----------|-------|----------|-------|
| | Dollars. | Cts. | Dollars. | Cts. |
| | | | | |
| | | | | |
| | | | | |
| Credits: | | | | |
| | Dollars. | Cts. | Dollars. | Cts. |
| | | | | |
| | | | | |
| | | | | |

The following described property, to wit:

The undersigned further represent.. that the foregoing account contains a correct statement of all the goods, moneys, property and effects of said deceased, which have come to possession or knowledge, and also of all expenditures and disbursements made by for or on account of said estate.

That the funeral charges, expenses of the last sickness of said deceased, and of administering estate, together with all claims allowed against it have been paid.

That
are sole of said deceased,
..... of the personal estate of said deceased there
remains a residue of dollars in cash, and
..... dollars, consisting of the residue of the
personal estate described above, and there also remains
..... dollars, being the proceeds of the sale of
the real estate, and of the real estate there remains the pieces
and parcels of land described above, to be assigned to the
above named or to such other
person or persons as this court shall determine to be by law
entitled to the same.

Wherefore, the undersigned pray.. that the foregoing may be
allowed as final account.

.....
.....

(Venue)

....., the above petitioner, being duly
sworn, say that he ha.. read the foregoing account and repre-
sentations by subscribed, and know .. the contents
thereof, and that the same are true of own knowl-
edge, except as to the matters stated to be on in-
formation and belief, and as to those matters ..he.. believe..
them to be true.

.....

Subscribed, etc.

(Caption)

This day having been assigned by the court for hearing the
foregoing final account of as such
....., and it appearing satisfactorily to
the court by due proof on file herein that due notice of the hear-
ing of said account has been given to all persons interested, as
directed by the court; and it further satisfactorily appearing,
after a full examination and hearing upon said account, that
the same is just and correct, and ought to be allowed, except
the items hereinafter mentioned, it is ordered, adjudged and
decreed by the court that the said account be and it is hereby
allowed as the final account of the said
except the following items, which are allowed as follows: viz.:
(Enumerate items and give amounts.)

.....,
Judge of Probate.

2362 Approval, effect

The approval of an administrator's report does not amount to a settlement of the estate and to a discharge of the administrator.¹⁰⁴

2363 Approval; notice, constructive

An order of approval of a final report cannot be entered without notice to the heirs of the decedent.¹⁰⁵ Constructive notice to a nonresident heir of final settlement and application for a discharge of an executor or administrator is valid only when there is a prior entry of an order of court fixing the manner in which such notice shall be given.¹⁰⁶

2364 Petition to vacate order, nature

A petition to vacate an order approving the final settlement of an executor or administrator on the ground of lack of notice to heirs is not a collateral proceeding.¹⁰⁷

2365 Order denying, etc., appeal

An order denying a motion to set aside an order approving a final account and to fix fees of an executor or an administrator is appealable.¹⁰⁸

2366 Appeal, scope

An appeal from a decree upon an administrator's final account will be treated separately as to each item.¹⁰⁹

DISTRIBUTION

2367 Notice, necessity

Notice to all persons whose rights are to be affected by an order of distribution is essential to its validity.¹¹⁰

¹⁰⁴ Atherton v. Hughes, 249 Ill. 322.

¹⁰⁵ Frank v. People, 147 Ill. 105, 109, 110 (1893); Sec. 112, c. 3, Rev. Stat. (Hurd's Stat. 1911, p. 30).

¹⁰⁶ Reizer v. Mertz, 223 Ill. 563.

¹⁰⁷ Reizer v. Mertz, 223 Ill. 564.

¹⁰⁸ Griswold v. Smith, 221 Ill. 341, 353 (1906).

¹⁰⁹ Whittemore v. Coleman, 239 Ill. 452.

¹¹⁰ Long v. Thompson, 60 Ill. 27, 29 (1871).

2368 Order, annulment

An unexecuted order of distribution may be vacated for error at a subsequent term on notice.¹¹¹

2369 Appeal; application, notice (Mich.)

State of Michigan.

In the probate court for the county of

In the matter of the estate of, deceased.

To the honorable, probate judge:

Notice is hereby given that of
, both as executor of the estate aforesaid and in
 his individual capacity as legatee, being aggrieved by the order
 of the above entitled court made on day of
, 19.., in the matter of the above estate, upon the
 petition of the undersigned as executor of said estate praying
 that said estate be distributed according to the last will and
 testament of the deceased, hereby appeals to the circuit court
 for the county of and state of Michigan from said
 order, for the following reasons: first, because the order so
 appealed from finds that of the
 is the widow of said deceased. (Proceed with the
 remaining reasons in similar manner)

Dated, etc.

.....,
 Executor.

.....,
 in his individual capacity.

.....,
 Attorney for appellant.

.....,
 Business address.

(Venue)

Personally appeared before me this day of
, 19.., who being duly sworn deposes and says
 that the foregoing application and notice by him subscribed is
 true in substance and in fact.

.....,
 (Official character)

My commission expires

¹¹¹ Long v. Thompson, 60 Ill. 30.

2370 Appeal; order allowing (Mich.)

State of Michigan.

In the probate court for the county of

At a session of said court, held at the probate office in the city of, in said county, on the day of, 19... Present, honorable, judge of probate.

In the matter of the estate of, deceased,, both as executor of said estate, and in his individual capacity as legatee, having filed in said court a notice of appeal to the circuit court for said county, from the order of said court made on the day of, 19.., in the matter of the above estate, upon the petition of said, as executor of said estate, praying for said estate to be distributed according to the last will and testament of said deceased and the said having given a bond on such appeal which has been duly approved and filed, it is ordered, that notice of said appeal be given by personal service of a certified copy of this order, and of said notice of, and reasons for, appeal, upon, attorney in fact and at law for, by delivering to him a certified copy of this order, and of said application for appeal within days from the date of this order, and by serving notice thereafter of the hearing of said application, in said circuit court, according to the course and practice of said court.

.....,

Judge of Probate.

CHAPTER XXXIII

ADOPTION

IN GENERAL

§§

- 2371 Proceeding, nature
- 2372 Statute, construction

PARTIES

- 2373 Petitioner, insane spouse

JURISDICTION

- 2374 Presumption

PETITION

§§

- 2375 Requisites
- 2376 Form

DECREE

- 2377 Requisites
- 2378 Form

IN GENERAL

2371 Proceeding, nature

The right of adoption comes from the Roman law and is a special power conferred by statute. It was unknown to, and is in derogation of, the common law.¹ An adopted child has the same rights of inheritance as a naturally born child, except as to property which is expressly limited to the body or bodies of the adopted parents, and as to property from lineal or collateral kindred of such parents by right of representation.²

2372 Statute, construction

Statutes on adoption are strictly construed.³

PARTIES

2373 Petitioner, insane spouse

No adoption is permissible in Illinois by either husband or wife of an insane person.⁴

JURISDICTION

2374 Presumption

No presumptions can be indulged in favor of the jurisdiction of the county court over matters of adoption, as the power to exercise this jurisdiction is special and limited.⁵

¹ Watts v. Dull, 184 Ill. 86, 90 (1900).

² Flannigan v. Howard, 200 Ill. 396, 401, 403 (1902); Sec. 5, c. 4, Hurd's Stat. 1911, p. 36.

³ Watts v. Dull, *supra*.

⁴ Watts v. Dull, 184 Ill. 92, 93; Sec. 1, c. 4, Hurd's Stat. 1911.

⁵ Watts v. Dull, 184 Ill. 91.

PETITION

2375 Requisites

The name and residence of the parents of the child, if alive and known to the petitioner, must be stated in the petition, and if unknown that fact must also be stated.⁶ Stating the place of residence of a child's parents in their written consent, which is attached to the petition and therein referred to, is sufficient under the statute, although the proper place for the averment of name and residence of parents is in the petition.⁷ The petition must also allege, in case of a parent's desertion of the child, that the desertion continued for one year next preceding the application.⁸

2376 Form (Ill.)

(Venue)

In the county court of county,

To the term, 19..

To the honorable, judge of said court.

Your petitioner,, widow, of, in said county and state, would respectfully represent unto your honor:

That she is a resident of said county, and is desirous of adopting a child, so as to render it capable of inheriting her estate. That the name of said child is, who was of the age of years on the day of, 19.., and is a female child; that the parents of said child are living; and that their names are respectively,; that the said has resided with your petitioner for some time past, and is attending the public school in for the purpose of obtaining an education; that the schools near where her parents reside afford but small facilities for an education, and that her parents' means are too limited to enable them to send her away to school; that your petitioner is a widow, and possessed of ample means, both real and personal, to educate said child in a suitable manner; and that she, your petitioner, being alone, is able to surround said child with the comforts of life and all proper moral influences; and that it will be to the interest of said child to become the adopted child of your petitioner.

⁶ Watts v. Dull, 184 Ill. 93; Sec. 2, c. 4, Hurd's Stat. 1911.

⁷ Flannigan v. Howard, 200 Ill. 400.

⁸ Watts v. Dull, 184 Ill. 95; Sec. 3, c. 4, Hurd's Stat. 1911.

That the parents of said child have given their consent herein and file the same in writing, waiving notice of this application, as will more fully appear upon a hearing herein.

Your petitioner therefore prays this honorable court to make an order declaring said child to be the adopted child of your petitioner and capable of inheriting her estate. That the name of said child shall not be changed, but shall remain as it now is, according to the statute in such case made and provided.

.....,
Attorney for petitioner.

(Verification)

Consent

We,, of
....., in the county of and state of Illi-
nois, father and mother of, a minor
child, do hereby consent to the adoption of said child by
....., of, in said county
and state, in manner and form as provided by an act of the
general assembly of the state of Illinois, approved February 27,
1874, and hereby waive service of notice of application therefor.

Dated this, etc.

(Michigan)

State of Michigan, } ss.
..... county. }

In the probate court of said county.

In the matter of the petition of

.....

to adopt

.....

We, and
his wife, respectfully represent that we reside in the
of in said county; that
a minor, is the of, and
....., and was of the age of
years on the day of, 19..; that we
do hereby declare the adoption of
said minor, by us, and each of us, as our child, and that we intend
to make said child our heir, and the heir of each of us, and desire
that said child shall hereafter bear the name of;
and that being the
of said child,, do hereby consent to
said adoption and change of name of said child.

We therefore pray that an order be made by said court that
said and, his wife, do stand in the
place of parents to said child, and that the name of said child
be changed to

In witness whereof, we have hereunto set our hands and seals
this day of, 19...

We therefore pray that an order be made by said court that
said and, his wife, do stand in
the place of parents to said child, and that the name of said
child be changed to

.....
.....
(Signatures and seals) ⁹

Approved by county agent

State of Michigan, }
..... county. } ss.

To the probate court for said county:

After due investigation, I find the within named
....., and, his wife, to be of
good moral character and able to provide a suitable home for
....., the minor within named.

I, therefore, approve of the adoption of said minor by the
parties within named.

Dated, etc.,
County agent of the state board of charities and corrections.

DECREE

2377 Requisites

In the case of a child's desertion by its parent, the decree
should find that the desertion had continued for the statutory
period.¹⁰

2378 Form (Ill.)

State of Illinois, }
..... county. } ss.

In the county court of county,

To the term, 19..

In the matter of the petition of

.....
for an order declaring

.....
to be her adopted child.

And, now on this day of, 19..,
the above cause coming on to be heard upon the petition filed
herein, and proofs adduced in support of the facts therein
stated; and it appearing to the court from the petition and
the evidence herein, that said petitioner is a resident of said
county, and desires to adopt said child; that said child is a
female, and was of the age of years on the

⁹ Add acknowledgment of instru-
ment by all parties—each of the
foster as well as the natural parents.

¹⁰ *Watts v. Dull, supra*; Sec. 3,
c. 4, Hurd's Stat. 1911.

day of, 19...; that the said petitioner does not desire the name of said child changed; that the mother and father of said child are living, and consent in writing to the adoption of said child by said petitioner; that the said is a proper person and has sufficient means and ability to bring up said child, and furnish it suitable nurture and education; and all the other matters and facts in said petition being shown to be true, and that it would therefore be to the best interest of said child to be the adopted child of said petitioner; and it further appearing that the parents of said child, have had due notice of this application, and of the time when and where it would be presented, and have given their full consent thereto in writing filed herein; it is therefore ordered and adjudged by the court, that the said be, from henceforth, the adopted child of said petitioner and capable of inheriting her estate and that said petitioner pay the costs of this proceeding.

Judge of the county court of county, Illinois.

b

On this day come the said petitioner by, ..h.. attorney, and this cause coming on to be heard upon the petition herein, and evidence adduced by the petitioner,, and the court having heard the testimony in open court, and the arguments of counsel, and now being fully advised in the premises, the court finds that the allegations in said petition are fully proven; that (State special matter).

The court further finds that the of said minor child,, consent to the adoption of said child by the petitioner,; that said child is a child, of the age of years; that its present name is; that the petitioner of sufficient ability to bring up the said child and furnish suitable nurture and education therefor; and that it is fit and proper that such adoption should be made.

It is therefore ordered, adjudged and decreed, in accordance with the statute in such cases made and provided, that from this date the said child,, shall, to all legal intents and purposes, be the child of the petitioner,, and for the purposes of inheritance and all other legal incidents and consequences, shall be the same as if ..h.. had been born to them in lawful wedlock.

It is further ordered, adjudged and decreed, that the name of said child be changed to according to the prayer of the petitioner herein.

CHAPTER XXXIV

AD QUOD DAMNUM

At common law the writ of *ad quod damnum* was used for the purpose of taking land for road and canal purposes, and is superseded by condemnation proceedings.

CHAPTER XXXV

AGREED AND COMPROMISED CASES

AGREED CASE

§§

- 2379 Jurisdiction
- 2380 Submission, nature and scope
- 2381 Submission, requisites
- 2382 Submission, form
- 2383 Affidavit of good faith, necessity

AGREED AND SETTLED CASE (MD.)

- 2384 Power of attorney
- 2385 Declaration

§§

- 2386 Appearance, plea and joinder
- 2387 Compromise agreement
- 2388 Satisfaction of judgment

COMPROMISE OF TORT ACTION (VA.)

- 2389 Jurisdiction
- 2390 Petition
- 2391 Answer by adult defendant
- 2392 Answer by guardian
- 2393 Answer by railway company
- 2394 Decree

AGREED CASE

2379 Jurisdiction

Under Michigan practice, controversies may be submitted to the circuit courts upon an agreed statement of facts before or after the commencement of an action.¹

2380 Submission, nature and scope

An agreed case is equivalent to a finding of facts by a court, or to a special verdict of a jury, in which every fact that is necessary for a recovery must be expressly found and stated, and confers no power upon the court to draw inferences from inconclusive facts, or to remove doubts by further proof.² In Maryland courts are permitted to draw inferences of fact or of law from an agreed statement of facts.³

2381 Submission, requisites

The submission or statement of facts must contain, without inferences, every fact that is necessary to a recovery; and there

¹ (310), C. L. 1897 (Mich.).

² Goodrich v. Detroit, 12 Mich. 279, 288 (1864).

³ 1 Poe's Code of Public General Laws, p. 749.

must be a written stipulation of the facts agreed upon, signed by the parties or their attorneys, and filed before judgment.⁴

2382 Submission, form (Ill.)

(Caption)

1. We,, do hereby mutually agree to submit to judge of said court certain matters in controversy between us for his determination without jury, he to hear the same forthwith and enter a judgment or a decree of the court thereon forthwith after such hearing is concluded.

2. That said judgment or decree shall contain a statement as to what matters in controversy were so submitted and such statement thereof shall be conclusive.

3. That no record except this agreement and of such judgment or decree shall be made as to the matters in controversy so submitted or as to the proceedings at any hearing thereof.

4. That said judgment or decree may be enforced in a like manner as other judgments and decrees of said court.

5. That we, each to the other, hereby waive all right of appeal from such judgment or decree and release all errors that may intervene in the hearing of the matters so submitted and in entering up of the judgment or decree therein, and agree that this release of errors may be pleaded in bar of any writ of error that may be issued out as to such judgment or decree.

Witness our hands and seals this day of, 19...

.....

 (Signatures and seals)

2383 Affidavit of good faith, necessity

In an agreed case submitted without bringing suit, it is essential to file an affidavit that the controversy is real and that the agreement was made in good faith to determine the rights of the parties.⁵

AGREED AND SETTLED CASE (MD.)

2384 Power of attorney

We, (widow) of, deceased, and (mother) and next friend of, infant children of said

⁴ Farrand v. Bentley, 6 Mich. 279, 283 (1859); Goodrich v. Detroit, *supra*.

⁵ (310), C. L. 1897.

....., deceased, hereby appoint
 our attorney to bring suit for
 (widow) and and
 infants, suing by
, their (mother) and next friend, in the
 of or any other court of record in
 the state of Maryland against the
 for damages caused to the said
 (widow) and and
 infants by the death of the said, who
 was killed by a train on in the
 while engaged in the performance
 of his duties as in the service of
; and we authorize the said
 to prosecute said suit to verdict or to com-
 promise and settle said suit and cause of action for the sum of
 dollars, and to make the necessary entries in said
 court, entering said suit and the cause of action agreed and
 settled on behalf of the said (widow)
 and and,
 infants.

Witness my hand and seal this day of,
 19...

.....(Seal)

Widow and beneficiary.

Witnesses:

.....(Seal)

..... Mother and next friend of
 and
 infant children of deceased.

2385 Declaration

(Caption)

The state of Maryland, for the use of
 widow, and and
 infant children of, deceased, by
, their mother and next friend, by
, its attorney, sues, the

For that, at the time of the wrongs and injuries hereinafter
 mentioned, the said company was operating a railroad within
 the state of, and
 husband of and father of
 and, infants, was employed as
 in the service of said company, and the defendant did not use
 due care towards the said, em-

ployed in its service as aforesaid, and by the wrongful act, neglect and default of the defendant, the said, although exercising due care and caution on his part, was heretofore, to wit, on the day of, 19..., within the state of, to wit, on killed by being run over by train, to the great loss, damage and injury of the said equitable plaintiffs. And the plaintiff claims dollars.

.....,
Attorney for plaintiff.

2386 Appearance, plea and joinder

To, clerk of the court
of

Please docket this case by consent as of the term, 19..., and enter the appearance of, esquire, for defendant, and enter the general issue "that the defendant did not commit the wrongs alleged" short on the docket and joinder of issue thereon.

.....,
Attorney for plaintiffs.

.....,
Attorney for defendant.

2387 Compromise agreement

It is agreed that this suit and the said cause of action shall be compromised and settled by the payment by the defendant to the plaintiff of the sum of dollars and the cost of suit.

.....

.....

(Signatures of counsel for both parties)

2388 Satisfaction of judgment

To, clerk of court of
.....

As the amount agreed upon in compromise and settlement of this case and the cause of action has been fully paid by the

defendant to the plaintiff, and all costs have been paid, you will enter this case agreed and settled.

.....

 (Signatures of counsel for both parties)

COMPROMISE OF TORT ACTION (VA.)

2389 Jurisdiction

The compromise of a tort action must be carried out in Virginia in the circuit court, as that court has jurisdiction over probate matters.

2390 Petition

To the honorable, judge of the
 court of county.

Your petitioner, administratrix
 of, deceased, respectfully represents the following case:

1. That she is the oldest daughter of the said
; that the said decedent left the following children, brothers and sisters of your petitioner, surviving him, to wit:, years of age,
 and, who are all under the age of twenty-one years, and who reside together with your petitioner at street,

2. That on the day of, while the said was engaged in his lawful employment in the service of the at yard in county, about miles from the city of, and was in the act of crossing the tracks of the said, the said was struck by a yard engine of the said and was instantly killed.

3. That on the day of the court of county granted your petitioner letters of administration upon the estate of her father, the said; thereupon, she qualified as such administratrix, and in pursuance of her duties as such administratrix, your petitioner has made a demand upon the said for the payment of damages growing out of the death of her father; that as a result of this demand and the subsequent negotiations, an offer has been made by the said company to pay on account of the death of the said the sum of dollars, and whatever costs have accrued in the suit instituted by your petitioner against the said in this behalf;

and that an acceptance of said offer your petitioner is advised and believes to be for the best interest of the estate of the said , and any and all parties entitled to participate in the distribution of the said estate.

Your petitioner charges that she is the wife of ; that they have a family of small children of their own of tender age, and that their means of support are small, and that the said children of the said decedent are also of tender age and dependent upon her in a large measure, if not entirely, for their support; that she is advised that it is very doubtful whether she could recover against the said a judgment for any sum, and that if resort must be had to the court in order to enforce her demand, if any, she has against the said the cost of litigation taken in connection with the consequent delay would greatly reduce any sum, if any sum be recovered, and that it will not be as beneficial to the estate as a prompt settlement, and payment at this time of the amount of dollars hereinbefore referred to having been agreed to be paid by the said

Your petitioner is advised that in consequence of the minority of some of the aforesaid children of the deceased, it will be necessary in order to effectuate this compromise to obtain the approval of the judge of the court of county , wherein the said accident occurred and, therefore, your honor's court has jurisdiction to hear and determine all questions in connection with this matter.

5. Your petitioner is also advised that under section 2904 Pollard's Code of Virginia, the amount recovered for death occasioned by wrongful or negligent act by any person or corporation, shall after the payment of the costs or attorney's fees be distributed among the children of the said decedent in such proportions as the jury may direct, and where the same is paid as the result of compromise by section 2905 then the same shall be distributed to one or more of the above mentioned parties, as in the opinion of the judge of the court may seem proper.

That your petitioner charges that the said left no estate other than that hereinbefore mentioned, and that the infant children are dependent upon your petitioner for care and sustenance.

In consideration of the premises, the prayer of your petitioner is that a decree of your honor's court may be entered ratifying and confirming the aforesaid compromise, and that in view of your petitioner's financial condition, and the dependence of the aforesaid infant children, that the aforesaid sum may be equally apportioned among all of the children aforesaid, and that after such apportionment the sums then due the infant children, who are dependent upon your peti-

tioner be paid to her; that the above mentioned
 and the said be made
 party defendants to this petition, and be compelled to answer
 the same. The infants by their duly appointed guardian
ad litem and the adult in his own proper person, but not under
 oath, answer under oath being hereby waived; that proper proc-
 ess may issue; and that all other and further orders may be
 entered as are requisite to the proper and lawful adjustment of
 this matter.

Your petitioner will ever pray, etc.

(Verification)

2391 Answer by adult defendant

(Caption)

The separate answer of to the
 petition filed by, administratrix of
, praying approval of the compro-
 mise of the claim of the said estate with

This respondent, waiving all process on the aforesaid peti-
 tion, for answer thereto, or to so much thereof as he is advised
 it is necessary for him to answer, answering says:

1. That he admits all of the allegations set out in said peti-
 tion to be true.

2. That this respondent submits to the court all the matters
 and things therein set forth for his decision thereon, and unites
 in the prayer of said petition that the compromise promised, as
 set forth therein, may be authorized and approved.

And having fully answered, this respondent prays to be
 hence dismissed, etc.

2392 Answer by guardian

(Caption)

The separate answer of and
, infants, by their guardian *ad*
litem appointed to represent their interests in this matter, to a
 petition filed this day against them in court of
 county by, adminis-
 tratrix of, deceased, praying the
 approval of the compromise between said estate and
, as in said petition set forth, and the distribution
 of the fund derived from said compromise.

These respondents by their duly appointed guardians *ad*
litem, waiving all process on aforesaid petition, for answer
 thereto, or to so much thereof as they are advised it is neces-
 sary for them to answer, answering say:

That these respondents are of tender age, and submit their

rights and interests in the matters and things in said petition set forth to the protection of the court.

And having fully answered, these respondents pray to be hence dismissed, etc.

2393 Answer by railway company

(Caption)

This respondent waiving all process on the aforesaid petition for answer thereto, or to so much thereof as it is advised it is material to answer, answering says:

1. That this respondent is not advised as to the truth of the allegations set out in paragraph one of said petition, but believes the same to be true.

2. This respondent admits that the said lost his life by being struck by a shifting engine of this respondent, at the time and place alleged in said petition, but does not believe that said accident was due to the negligence on any part of this respondent, or to any of its servants or agents. This respondent further admits that it has offered to compromise the claims of the estate of the said deceased, against it, growing out of said accident, for the sum of dollars, and this respondent is now willing to pay the same, if said compromise is approved by this court.

3. This respondent admits that its principal office is in the city of

4. This respondent is not advised as to the truth of the allegations as to the needs of the petitioner and the propriety of the distribution asked for by the petition, and does not deny the same, but submits to the court all matters as to the distribution of the fund derived from said compromise, should the same be approved.

And having fully answered, this respondent prays to be hence dismissed, etc.

.....
By,
its counsel.

2394 Decree

(Caption)

This day came, administratrix of deceased, in her own proper person, in open court and filed her petition, duly sworn to, under section 2905 of the Code of Virginia, averring that her intestate, the late lost his life on the day of by being struck by a shifting engine of the, as set forth in the said petition; that the death of the said was caused by the wrongful act, neglect or default of the said....

.....; that the said has duly qualified as administratrix of the said; and that she has, subject to the approval of this court, agreed to a compromise of all the claims or demands which she has, as administratrix, or daughter of the said deceased, against by reason of the injuries to and the death of the said for the sum of dollars; said petition sets forth reasons for making this compromise, and prays the court to ratify and approve the same.

And on motion of petitioner,, a discreet and competent attorney at law, practicing at the bar of this court, is appointed guardian *ad litem*, for the infant defendants to defend them in their answer; and thereupon, the said guardian *ad litem* filed the joint answer of the infant defendants to the said petition.

And then came the defendant, in his own proper person, and filed his answer to the aforesaid petition, to which the plaintiff replied generally.

And also this day came, the, by its attorney, and without admitting its liability to the petitioner, filed its answer in this cause, admitting its willingness to compromise said claims on the basis aforesaid, and submitting to the court the propriety of the ratification of said settlement.

And it appearing to the court from the petition and answers and from statements made at the bar as to the condition of the parties interested and the circumstances surrounding them, that it is to the best interest of the said estate, and to the persons entitled to share in the fund derived as aforesaid, that said compromise settlement should be approved; and it further appearing to the court that all of the parties who under the statute of Virginia have any interest in the fund derived on account of said compromise settlement are now before the court, the court doth ratify and approve said compromise settlement; and the said infants and being incapable of making any valid agreement as to the said compromise, the court doth ratify the same as to the said infants.

And the said infants and being incapable of making any valid agreement as to the proper distribution of the said money when paid and the said adult parties having submitted the question of the distribution of the said fund to the court, the court doth proceed under section 2905 of the said statute to make said distribution, and doth direct that the total sum of dollars be paid to, administratrix of, deceased, or to, her attorney, and doth direct that the said, administratrix shall pay the costs incident to these proceedings, and that she shall distribute the remainder of the said

fund equally between the aforesaid children, and that the amounts due to the said infant children, who are dependent on said for support to be paid direct to her.

Dated, etc.

.....,

Judge.

The foregoing decree was received in the office of the clerk of court on the day of, entered as a vacation decree.

Test:

....., Clerk.

CHAPTER XXXVI

APPEAL CASES

(INTERMEDIATE COURTS)

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IN GENERAL

2395 Proceeding, nature

An appeal from a justice of the peace is tried *de novo* in circuit courts.¹ The mere appeal from a judgment of a justice of the peace does not affect the rights acquired under the judgment, when the party appealing has no defense to the action.²

2396 Jurisdiction, scope

Under Michigan practice, the questions to be reviewed on appeal from a justice of the peace are limited to those actually decided by the justice, or reasonably involved in his action, as shown by the specific grounds of error in the affidavit for the special appeal.³

¹ Rathbone Oil Tract Co. v. Rauch, 5 W. Va. 79, 83 (1871); Shook v. Thomas, 21 Ill. 87, 90 (1859); Secs. 72, 73, 74, c. 79, Hurd's Stat. 1909, p. 1405.

² Becker v. Illinois Central R. Co., 250 Ill. 40, 45 (1911).

³ Curtis v. Garrison, 148 Mich. 226, 228, 229 (1907); Osborne v. Osborne, 156 Mich. 413, 415 (1909).

PRACTICE

2397 Summons, necessity of

An appellee, in Illinois, is bound to follow up an appeal taken and perfected before a justice of the peace at any time within twenty days, without the service upon him of a summons or other notice of appeal.⁴ The issuance and service of summons are necessary when the appeal is not perfected before the justice.

2398 Summons, form (D. C.)

In the supreme court of the District of Columbia.

| | |
|-------------------------|--------------------|
| | } At Law, No. |
| Plaintiff.., Appell.... | |
| v. | |
| | |
| Defendant.., Appell.... | |

The President of the United States to the appellee, greeting: *

The appellant having docketed an appeal in the supreme court of the District of Columbia, from the judgment of the municipal court of the District of Columbia, therefore,

You are hereby summoned to appear in said supreme court, on or before the tenth day, exclusive of Sundays and legal holidays, after the service of this writ on you, and show cause why the said appellant.. should not have judgment against you therein.

Witness, the honorable, chief justice of said court, the day of, 19...
, Clerk.

By, Assistant Clerk.

....., Attorney.

| | | |
|--|------------|-------|
| No. | At Law | ===== |
| | Appell.... | ===== |
| v. | | |
| | Appell.... | ===== |
| Issued, 19.. | | ===== |
| Summons on Appeal from Municipal Court. | | ===== |
| Served copy of this summons on the Appellee within named, the day of, 19.. | | ===== |
| Marshal. | | |

⁴ Fix v. Quinn, 75 Ill. 232, 233 (1874); Sec. 1, art. 10, c. 79, Hurd's Stat. 1909, p. 1396.

(Virginia)

Commonwealth of Virginia.

To the sheriff of the county of, greeting:

We command that you summon
and to appear before the circuit
court of the county of at the court house the
. day of the next term (.) at . . . o'clock
in the noon to answer an appeal of right taken by
. and from
an order entered by the clerk of the circuit court on the
day of, admitting to probate a writing purporting
to be the last will and testament of,
deceased.

And have then this writ.

Witness,, clerk of the said court
at the court house this day of, and
in the year of the commonwealth.

Executed this day of by serving
a true copy of the within summons upon the within named.

2399 Supersedeas (Ill.)

State of Illinois, } ss.
. county. }

The people of the state of Illinois, to,
esquire, justice of the peace, and, a
constable in and for said county, greeting:

Whereas, you, the said, a justice
of the peace, as aforesaid, did, on the day of
., 19.., render a judgment in a certain suit lately
instituted and then pending before you, wherein
. plaintiff and
., defendant., in favor of the said
. and against the said
., for the restitution of certain premises de-
scribed in the plaint, to wit:
. besides
costs of suit, as it is said.

And whereas, the said ha.. taken
an appeal from the said judgment to our circuit court of
. county, and thereupon executed an appeal bond
with security according to law, now on file in the office of the
clerk of said circuit court;

Therefore we command and enjoin you, the said
., justice of the peace, and you the said
. constable as aforesaid, that you do
absolutely and entirely supersede and desist from proceeding

any further in said suit, and all proceedings in relation thereto you do absolutely suspend, until the further order of our said circuit court.

Witness, etc.

..... (Clerk).

2400 Motion to quash (Md.)

(Caption)

The appellant objects to the trial of this case upon the ground that the justice of the peace below was without jurisdiction to try the case and consequently this court is also without jurisdiction to hear and determine it upon its merits.

The appellant calls the court's attention to the fact that the writ of summons in this case was directed against
, and that the same contained no notice to the appellant of the character of the suit, and that neither a copy of said summons nor other valid notice was served upon the appellant; and because the appellant is a nonresident corporation, with its principal place of business in the city of, and while is its salesman, he is not an agent authorized to receive service of process under the Code of Public General Laws of this state.

.....,
 Appellant's attorney.

2401 Appearance (Ill.)

State of Illinois, }
 county. } ss.

In the circuit court of county.

In the matter of }
, } Appeal from the probate court
 Deceased. } of county.

..... hereby enter appearance
 as the attorney.. for the appellant in the above entitled cause.

.....
 (Signature)

(Caption)

..... hereby enter the appearance of
, appellee, and appearance as
 attorney.

.....
 (Signature)

(Caption)

..... hereby enter the appearance of the
 following heirs at law of, deceased,
 in the above entitled cause, to wit:

..... and

.....
 Attorney for said heirs at law.

DEFENSES

2402 Bill of particulars, discretion

On appeal from a justice of the peace it is discretionary with the trial court to require the plaintiff to file a declaration of his claim or an amended bill of particulars, unless this is necessary to be done to promote substantial justice.⁵

2403 Misnomer, waiver

A mistake in the Christian name of the plaintiff cannot be urged for the first time on appeal from a justice, under Illinois practice, as the objection can only be taken advantage of by plea in abatement before going to trial upon the merits before the justice.⁶

2404 Recoupment

A verbal notice of recoupment given in an action of assumpsit commenced before a justice of the peace, is insufficient to save the defense of recoupment on appeal from the justice.⁷

2405 General issue, plea (W. Va.)

(Caption)

The said defendant for answer and defense to the summons and complaint in this case says that he owes the said plaintiff,, nothing on account of the matters and things alleged in the said summons and complaint and sued for in this action, and that said plaintiff is entitled to recover nothing from him in the action.

TRIAL

2406 Verdict (Va.)

We, the jury, on the issue find that the paper writing dated day of is the last will and testament of, deceased.

(West Virginia)

We, the jury, do find that the paper writings propounded as the last will of the decedent,, and offered in evidence in this case is the true last will and testament of the said decedent,.....
....., Foreman.

⁵ Averill v. Boyer, 69 W. Va. 396 (1911).

⁶ Moss v. Flint, 13 Ill. 570 (1852).

⁷ Kerr v. Bennett, 109 Mich. 546, 547 (1896).

2407 Judgment admitting will to probate, requisites

In appeals from the county court to a circuit court, an order of affirmance is all that is necessary upon the affirmance of the county court judgment; the statutory provision with respect to reviewing courts being applicable to circuit courts.⁸

2408 Judgment, admitting will to probate (Ill.)

(Caption)

In the matter of the probate of the last will and testament of , deceased; appeal from an order of the county court refusing probate of said will.

And now on this day come the proponent executor named in said will by his attorneys, and also the objector, , by her attorneys, and it appearing to the court that this cause is an appeal from an order of the county court of county, state of Illinois, refusing to admit to probate an instrument purporting to be the last will and testament of , deceased; and it further appearing from the petition on file and in evidence herein that the said departed this life at her home in the city of in the said county on the day of , 19.., leaving an instrument purporting to be her last will and testament; that the names of all of the heirs at law and legatees and the places of residence of each are stated in said petition; that thereupon, the clerk of the county court gave due notice of the time for the hearing on said petition, as required by law; that said county court, on the day set for the hearing of said petition, refused to admit said instrument as the last will and testament of , deceased, to probate; and that the proponent then and there prayed an appeal from said order to this court, which appeal was allowed and the appeal bond was executed and approved as provided by law, and the transcript of the proceedings before the county court was made and filed in this court; and this cause coming on to be heard upon the evidence of the two subscribing witnesses, the testimony of other competent witnesses, and the exhibits offered in evidence by the proponent; and the court having heard the argument of counsel, and being fully advised in the premises doth find: That the said was a resident of county; that she departed this life at her home in the city of , on the day of , 19..; that she had on the day of , made her last will and testament and reduced the same to writing,

⁸ Kern v. Strasberger, 71 Ill. 303, 307 (1874); Sec. 112, Practice act 1907 (Ill.).

which she on the day last aforesaid duly signed, published and attested and is the instrument now offered for probate; that the said will was attested in the presence of said testatrix by two witnesses who were present and saw her sign the said will and testament in their presence; that said testatrix then and there acknowledged said will to be her act and deed; that said witnesses then and there signed their names as attesting witnesses to said will; that the said testatrix was of sound mind and memory at the time she signed and acknowledged the said instrument for her last will and testament; and that she was of lawful age and under no constraint or undue influence when said will was signed.

It is therefore ordered and adjudged by the court that the said alleged instrument is the last will and testament of the said deceased, duly signed and executed by her and attested in her presence by witnesses as provided by law; that the said will shall be and the same is hereby admitted to probate; and that a copy of this order, certified to by the clerk of this court, shall be attached to the said last will and testament of the said, and shall be transmitted to the county court as provided by law.

It is further ordered that the costs of this proceeding shall be paid by the executor of the said last will and testament in due course of administration. To which rulings and findings of the court the objector excepts and prays an appeal to the supreme court of the state of Illinois; which prayer is allowed and appeal granted on condition that the said give security to be approved by the clerk of this court, bond to be filed within days and bill of exceptions to be presented within days from this day of, 19...

(West Virginia)

The motion made at the last regular term of this court by the plaintiffs, to set aside the verdict rendered by the jury and grant them a new trial, having been argued by counsel, the court, upon full consideration thereof, doth, this day of, 19.., overrule and deny; whereupon, it is considered by the court that the paper writing propounded as the last will and testament of the decedent,, and offered in evidence in this cause as such, is, and is hereby adjudged to be, the true last will and testament of the decedent aforesaid, and the order of the county court appealed from, admitting the said will to probate, is hereby affirmed. And it is further considered by the court that the defendants and appellees, the proponents of said will, do recover of and others, the contestants and appellees, their costs by them in this appeal expended. To which ruling and decision upon said motion and said judgment upon said will the plain-

tiffs object and except. It is accordingly further by the court ordered that a copy of this order and sentence, together with the said will, be returned to and filed with the clerk of the county court of this county.

2409 Judgment, dismissal and affirmance

A judgment of dismissal and affirmance of a judgment of a justice of the peace can be entered in the circuit court only when the appellant fails to appear to prosecute his appeal; no such a judgment can be entered on the trial of the case.

2410 Appeal, petition (W. Va.)

To the honorable judge of the circuit court of county, West Virginia:

The petitioners, a sister of deceased late of, and, only living children of deceased, sister of said deceased, only child of deceased, and all heirs at law of the said deceased respectfully show, that they are aggrieved by an order or sentence of the county court of county, West Virginia, in admitting the papers purporting to be the will of the said deceased dated, 19.., to probate upon the day of, 19.., as will appear by a copy of the order admitting it to probate by said court.

And your petitioners appeal to this honorable court from said order or sentence and as grounds of their appeal allege the following:

1. That the testator was not of sound mind.
2. That he was unduly influenced in making said will.
3. That said papers are not valid as they have been revoked by obliterating, canceling and destroying by scratching the same.
4. That said papers are invalid because of ambiguity and uncertainty.
5. That said papers are not the testator's completed intention.

Your petitioners further show that and are interested in the said papers purporting to be the will of said deceased as they are named as executors therein, also that and only children of deceased who was a brother of the said deceased are interested

^o Shook v. Thomas, *supra*; Secs. 72, 73, 74, c. 79, Hurd's Stat. 1909, p. 1405.

in said will they being with your petitioners the only heirs at law of the said deceased.

Your petitioners therefore pray that they may be allowed to appeal from said order or sentence, and that proper sentence may issue on this their petition against the said and named as executors, and against the said and That said executors be required to file with the clerk of this court within thirty days any other paper purporting to be the will of the said testator or any account books that shall come before this court upon this appeal. That the clerk of the county court of this county be directed to file said papers purporting to be the will of said deceased with the clerk of this court within thirty days together with all the original papers filed or used in the proceedings for the probate, together with copies of all orders and proceedings thereon.

And that the cause may be proceeded in, tried and determined in this honorable court as is prescribed by law; and they will ever pray, etc.

.....
By.....
their attorneys.

(Attach order referred to)

2411 Appeal, order

In the matter of paper writings admitted to probate as the will of deceased in the county court.

This day came heirs at law of, deceased, late of this county, respectfully showing that they are aggrieved by an order or sentence of the county court of county, West Virginia, in admitting the papers purporting to be the will of, deceased, dated, 19.., to probate upon the day of, 19.., as appears by a copy of their order filed with their petition. And it appearing that the other persons interested in the probate of said writing besides the petitioners, are and named as executors in said writing, also and; it is ordered that said appeal be granted; that the clerk of this court do issue proper process thereon against the said and against the said and as said executors named in said will, also against the said and, returnable to rules, 19..; and that the clerk of the county court of this county do transmit to the clerk of this court the said paper writings and all the original papers filed and in the proceedings for the probate thereof, together with copies of all orders and proceedings thereon.

CHAPTER XXXVII

APPLICATION FOR JUDGMENT AND ORDER OF SALE

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-
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IN GENERAL

2412 Proceeding, nature

An application for judgment and order of sale is a collateral proceeding in so far as jurisdictional questions are concerned.¹ Upon such an application the delinquent list stands as the declaration and the notice as the process.²

2413 Jurisdiction, presumption

A proceeding brought under the Illinois Local Improvement act of 1897 may be heard by the county court at its law or probate term.³

In deciding a variance between a delinquent list and a publication notice in a special assessment matter, the court must proceed upon the theory that it has jurisdiction of the person.⁴

¹ People v. Belz, 252 Ill. 296, 299 (1911); Stack v. People, 217 Ill. 220, 225 (1905).

² People v. Harper, 244 Ill. 121, 123 (1910).

³ People v. Brown, 218 Ill. 375, 380 (1905).

⁴ People v. Harper, *supra*.

2414 Pleading and practice

No pleadings, as at common law, are permissible on applications for judgment against delinquent lands. The objections must be made and determined in a summary manner.⁵

APPLICATION OR PETITION

2415 Making, time

An application for judgment and order of sale for a delinquent special assessment, when the assessment is payable in instalments, must be made, in Illinois, after April 1st following January 2nd after the date of the first voucher.⁶

2416 Notice, description

The notice of publication in a proceeding for delinquent special assessment need not contain a description of the improvement; and if a description is set out, the same may be considered as surplusage.⁷

2417 Notice, form (Ill.)

Notice, Delinquent Tax List of county.

Of lands and city, village and town lots situated in the county of and state of Illinois, on which the taxes, special assessments, with interest and costs, remaining due and unpaid for the year as herein set forth:

..... drainage tax for the year, township, range

| Names | Section | Acres | Amount |
|-------|---------|-------|--------|
| | | | |
| | | | |

State of Illinois, }
 county. } ss.

Notice is hereby given that I will make application at the regular term of the county court of county in the state of Illinois, to be holden at the court house in, the said county and state, on the, of, 19.., to wit, on the day of, 19.., for judgment against the foregoing tracts or parcels of land, city, village and town lots for the taxes, interest, costs and special assessments due thereon for the year; and also at the

⁵ People v. Kankakee & Southwestern R. Co., 237 Ill. 362, 367 (1908).

⁶ Gage v. People, 219 Ill. 634, 637 (1906).

⁷ People v. Harper, *supra*.

same time and place, I will apply for an order of said court to sell all of the foregoing described tracts or parcels of land, city, village and town lots on which the taxes, special assessments, interest and costs remain due and unpaid, and for the sale of which an order shall have been made by said court at said application and which tracts, etc., will be exposed at public sale at the court house in, in said county, on the of, 19.., to wit, on the day of, 19.., for the county taxes, special assessments, interest and costs due severally thereon.

For making, publishing and entering in the judgment tax sale book the cost is as follows, viz.:

Upon each tract of land \$.
 Upon each city, village or town lot
 The cost upon each tract or lot of land sold will be
 The cost upon each city or village or town lot sold
 will be

All taxes due and unpaid on the first day of May will bear interest at the rate of one per cent a month or fraction of a month until paid.

Treasurer and ex-officio collector county, Illinois.

2418 Petition (Ill.)

State of Illinois, }
 county. } ss.

In the county court of county,
 To the term, 19..

The people *ex rel.*

.....
 Treasurer and ex officio
 collector,
 v.

In the matter of the
 Application for judgment for
 Delinquent taxes.

Now comes,, county treasurer and ex officio collector in and for the said county of and state of Illinois, in his proper person and by state's attorney and presents to the court a duly certified copy of the newspaper containing a list of delinquent lands, town lots and railroad property, advertised as provided by law for the non-payment of taxes, special assessments, penalties, interest and costs due and unpaid thereon for the year and prior years.

And now the said, county collector as aforesaid, makes application for judgment against the said delinquent lands, town lots and railroad property for the taxes, special assessments, penalties, interest and costs, severally due and unpaid thereon for the year and prior years,

which the said list of delinquent taxes, special assessments, penalties, interest and costs are marked exhibits and made a part hereof.

.....
Delinquent list

State of Illinois, }
..... county. } ss.

Tax judgment, sale, redemption and forfeiture record in the county court of county, term, 19...

A list of lands and town lots reported by, the county collector of revenue for the year of 19.., in the county of and state of Illinois, upon which he has been unable to collect the taxes due and charged thereon; and now on this day of, 19.., he files with the county clerk this, his petition, for a judgment and order of sale against said lands and town lots. Also a record of the sale, redemption and forfeitures of said lands and town lots for taxes, special assessments, interest, cost and penalty due severally thereon, which were by said court at said term ordered to be sold as the law directs.

| Name of owner | Subdivision section, lot block | Section or lot | Town or block | Range | Number of acres, acres 100ths | State equalized valuation | Drainage district | Total taxes | Interest after May 1st | Special assess- ment | Costs | Amount of judg- ment |
|---------------|--------------------------------------|----------------|---------------|-------|-------------------------------------|------------------------------|-------------------|-------------|---------------------------|-------------------------|-------|-------------------------|
| | | | | | | | | | | | | |
| | | | | | | | | | | | | |
| | | | | | | | | | | | | |

State of Illinois, }
..... county. } ss.

I,, collector of county, state of Illinois, do solemnly swear that the foregoing is a true and correct list of delinquent lands and lots within the county of, upon which I have been unable to collect the taxes and special assessments and interest and printer's fees charged thereon as required by law for the year or years thereon set forth; that said taxes now remain due and unpaid as I verily believe.

.....
Subscribed, etc.

(Michigan)

State of Michigan,

To the circuit court for the county of, in chancery.

The petition of, auditor general of the state of Michigan, for and in behalf of said state respectfully shows that the list of lands hereinafter set forth and marked schedule "A," contains a description of all the lands in said county of, upon which taxes were assessed for the years mentioned therein, and which were returned as delinquent for non-payment of taxes and which taxes have not been paid, together with the total amount of such taxes, with interest computed thereon to the time fixed for sale, and collection fee and expenses, as provided by law, extended against each of said parcels of land.

Your petitioner further shows to the court that said lands were returned to the auditor general under the provisions of Act 206 of the Public Acts of 1893, as delinquent for non-payment of said taxes for said years respectively, and that said taxes remain unpaid; except that lands included in said schedule "A" for taxes of, or prior years, were returned to the auditor general as delinquent for said taxes under the provisions of the general tax laws in force prior to the passage of Act 200 of the Public Acts of 1891, and which taxes remain unpaid.

Your petitioner further shows that in all cases where lands are included in schedule "A" as aforesaid for taxes of, or of any prior year, said lands have not been sold for said taxes or have been heretofore sold for said delinquent taxes and the sale or sales so made have been set aside by a court of competent jurisdiction, or have been canceled as provided by law.

Your petitioner further shows and avers that the taxes interest, collection fee and expenses, as set forth in said schedule "A," are a valid lien on the several parcels of lands described in said schedule.

Your petitioner further shows that the said taxes on said described lands have remained unpaid for more than one year after they were returned as delinquent; and the said taxes not having been paid, and the same being now due and remaining unpaid as above set forth, your petitioner prays a decree in favor of the state of Michigan against each parcel of said lands, for the payment of the several amounts of taxes, interest, collection fee and expenses, as computed and extended in said schedule against the several parcels of land contained therein, and in default of payment of the said several sums computed and extended against said lands, that each of said parcels of land may be sold for the amounts due thereon, and

as provided by law, to pay the lien aforesaid. And your petitioner will ever pray, etc.

Dated, etc.

.....
Auditor general of the state of Michigan, for and in behalf
of said state.

Order for hearing

State of Michigan, }
County of } ss.

The circuit court for the county of, in chancery.

In the matter of the petition of, auditor general of the state of Michigan, for and in behalf of said state, for the sale of certain lands for taxes assessed thereon.

On reading and filing of the petition of the auditor general of the state of Michigan, praying for a decree in favor of the state of Michigan, against each parcel of land in said petition described for the amounts therein specified, claimed to be due for taxes, interest and charges on each of such parcel of land, and that such lands be sold for the amounts so claimed by the state of Michigan.

It is ordered that said petition shall be brought on for hearing and decree at the term of this court, to be held at the city of, in the county of, state of Michigan, on the day of 19.., at the opening of the court on that day, and that all persons interested in such lands or any part thereof, desiring to contest the lien claimed thereon by the state of Michigan, for such taxes, interest and charges, or any part, thereof, shall appear in said court, and file with the clerk thereof, acting as register in chancery, their objections thereto, on or before the first day of the term of this court above mentioned, and that in default thereof the same will be taken as confessed and a decree shall be taken and entered as prayed for in said petition.

And it is further ordered that in pursuance of said decree the lands described in said petition for which decree of sale shall be made, will be sold for the several taxes, interest and charges thereon as determined by such decree, on the first Tuesday in thereafter beginning at o'clock A. M., on said day, or on the day or days subsequent thereto as may be necessary to complete the sale of said lands and of each and every parcel thereof, at the office of the county treasurer, or at such convenient place as shall be selected by him at the county seat of the county of, state of Michigan; and that the sale then and there made be a public sale, and each parcel described in the decree shall be separately exposed for sale for the total taxes, interest and charges, and the sale shall be made to the person paying the full amount charged against such parcel, and accepting a conveyance of the

smallest undivided fee simple interest therein; or, if no person will pay the taxes and charges and take a conveyance of less than the entire parcel, then the whole parcel shall be offered and sold. If any parcel of land cannot be sold for taxes, interest and charges such parcel shall be passed over for the time being, and shall, on the succeeding day, or before the close of the sale, be re-offered; and if, on such second offer, or during such sale, the same cannot be sold for the amount aforesaid, the county treasurer shall bid off the same in the name of the state.

Witness the honorable, circuit judge, and the seal of said circuit court of county this day of, 19...

.....
Circuit Judge.

Countersigned,

.....
Register.

[Seal]

APPEARANCE

2419 General

Objections which call for the exercise of jurisdiction by the court and a decision upon the merits amount to a general appearance and waive all objections which go to the jurisdiction of the court.⁸ A general appearance upon application for judgment and order of sale waives objections to the publication and certificate thereof.⁹

OBJECTIONS TO SPECIFIC TAXES

CITY TAX

2420 Appropriation ordinance; purpose, contingent, etc.

The purpose for which an appropriation is made and the amount appropriated must be specified in detail in the ordinance, except that a small sum which will reasonably cover the small expenses of a municipality may be described as "contingent," "miscellaneous expenses," or "incidentals." The reasonableness of the amount thus appropriated is determinable only upon specific objection.¹⁰

⁸ Dickey v. People, 213 Ill. 51, (1904).

⁹ Marshall v. People, 219 Ill. 99, 102 (1905).

¹⁰ People v. Fenton & Thomas R. Co., 252 Ill. 372, 375 (1911); Art. 8, Cities and Villages act (Ill.).

One-eighth of the total of a city tax is too considerable an amount to levy under the general designation of "contingent and general expenses."¹¹

2421 Certified copy of ordinance

A city tax is invalid if there is no certified copy of the ordinance levying the tax.¹²

COUNTY TAX

2422 Additional levy, meeting

A county board has authority to levy an additional tax at a special meeting without waiting for the regular time for levying taxes.¹³

2423 Additional levy, resolution

An additional tax levy by the county board is void without the adoption of a resolution for the purpose.¹⁴

2424 Appropriation ordinance, requisites

It is the duty of the county board to ascertain the total of the county tax to be levied each year by determining and stating the amount that would be required for each purpose for which county taxes are leviable.¹⁵ Each item of a county tax should state the purpose with reasonable certainty and with such particularity that a tax-payer may know what expenditure the item was intended to cover.¹⁶ An omission to so specify the object and purpose will not annul an ordinance if it expressly refers to another ordinance containing the detailed information.¹⁷ A tax which fails to state the amount required for each distinct purpose separately, or which levies a gross amount for all purposes,

¹¹ *People v. Chicago*, B. & Q. R. Co., 253 Ill. 100, 101 (1912); Par. 111, c. 24, Hurd's Stat. 1909, p. 356.

¹² *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 213 Ill. 558, 561 (1905).

¹³ *Chicago & E. I. R. Co. v. People*, 218 Ill. 463, 466 (1905); Sec. 27, c. 34, Hurd's Stat. 1903.

¹⁴ *Chicago & E. I. R. Co. v. People*, 218 Ill. 467.

¹⁵ *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 213 Ill. 197 (1904).

¹⁶ *People v. Cairo, Vincennes & Chicago Ry. Co.*, 243 Ill. 217, 219 (1910); *People v. Toledo, St. L. & W. R. Co.*, 231 Ill. 498, 500, 501 (1907); *Chicago & E. I. R. Co. v. People*, 214 Ill. 23, 24 (1905).

¹⁷ *Chicago & E. I. R. Co. v. People*, 218 Ill. 464, 465.

is invalid.¹⁸ A single item for "salary of the county judge, mine inspector, janitor, matron for rest room and turnkey of jail" is sufficiently definite as a county tax levy. But there should be no grouping in one item of "supplies, light, heat, and water for court house and jail." The supplies to be used for the jail should be separate from those used for the court house.¹⁹

It is permissible to levy a gross sum for several different purposes which are properly embraced by some general designation, when it is difficult to determine in advance the amount of the several items. Thus, an item for "salary, clerk hire and expenses" of the county treasurer is valid.²⁰

A reference to a void ordinance which the second ordinance purports to amend will be regarded as surplusage when the latter ordinance is complete in itself.²¹

2425 Appropriation ordinance, passage

The statutory requirement that an appropriation ordinance shall be passed during the first quarter of the fiscal year has no application to sanitary districts, or to municipalities other than cities and villages.²²

2426 Appropriation ordinance, publication

An appropriation ordinance is void if it is not published within a month of its passage.²³

2427 Assessments

A county levy of a specific amount for "assessments" is invalid.²⁴

2428 Bridges

A county tax for "bridges" is sufficiently certain.²⁵

¹⁸ *People v. Cleveland, C., C. & St. L. Ry. Co.*, 231 Ill. 209, 210 (1907); *People v. Cairo, V. & C. Ry. Co.*, 237 Ill. 312, 313 (1908); *People v. Cairo, V. & C. Ry. Co.*, 243 Ill. 218 (1910); *Chicago, B. & Q. R. Co. v. People*, 213 Ill. 458, 467 (1905); *People v. Cincinnati, Indianapolis & Western Ry. Co.*, 213 Ill. 503, 505 (1904).

¹⁹ *People v. Cairo, V. & C. Ry. Co.*, 237 Ill. 316.

²⁰ *People v. Bowman*, 253 Ill. 234, 240 (1911).

²¹ *People v. Bowman*, 253 Ill. 245.

²² *People v. Bowman*, 253 Ill. 246; Par. 89, Cities and Villages act (Ill.).

²³ *People v. Bowman*, 253 Ill. 244.

²⁴ *People v. Bowman*, 253 Ill. 242.

²⁵ *People v. Bowman*, 253 Ill. 243.

2429 Building

A county tax for "building purposes," giving the amount, is too indefinite and is illegal.²⁶

2430 Building and incidental

A single amount as a county tax for "building and incidental expenses" is invalid, because the amount for each purpose should be stated separately.²⁷

2431 Coal, light and water

A county tax levy for "coal, light and water" is invalid.²⁸

2432 County farm

An appropriation for "county farm" is too general and is invalid.²⁹

2433 County jail

An item for "county jail" is too indefinite and is invalid.³⁰

2434 County jail fund account

A county tax for "county jail fund account" is invalid because the purpose of the levy is not definitely stated.³¹

2435 County purposes

A levy made for "county purposes" is invalid.³²

2436 County treasurer

It is lawful for a county to levy a tax with which to pay the county treasurer's compensation due him as supervisor of assessments, the amount thus levied being a fee of his office, and is to be applied as other fees to the payment of his fixed salary.³³

²⁶ People v. Chicago & E. I. R. Co., 248 Ill. 118, 119 (1911).

²⁷ People v. Cincinnati, L. & C. Ry. Co., 231 Ill. 363, 364 (1907); People v. Kankakee & Seneca R. Co., 231 Ill. 490, 491 (1907).

²⁸ People v. Toledo, St. L. & W. R. Co., 231 Ill. 502.

²⁹ People v. Bowman, 253 Ill. 241.

³⁰ People v. Bowman, *supra*.

³¹ People v. Cairo, V. & C. Ry. Co., 243 Ill. 217, 219 (1910).

³² Chicago, Indianapolis & Western Ry. Co. v. People, 214 Ill. 302, 303 (1905).

³³ People v. Bowman, 253 Ill. 240; Sec. 2, Act 1898.

2437 Court expenses, etc.

A single item for "court expenses, bailiffs and juries" is valid.³⁴

2438 Court and jail

In making a county levy, the amount necessary for a court house and jail should be separated, and the particular object for which the money is to be used, whether in building or repairing, should be designated.³⁵

2439 Court house

An amount levied for "court house" does not sufficiently designate the purpose for which the levy was made.³⁶

2440 Current expenses

A resolution of the board of supervisors directing the extension of a county tax for "current expenses of the county" is insufficient.³⁷

2441 Election expenses

Boards of election commissioners have authority to issue warrants for the payment of all city election expenses.³⁸ A separate tax may be levied to meet an item of election expenses which was audited by a distinct and different authority from that which has audited another similar item.³⁹

2442 Fees of county officers

A levy for "fees of county officers," is sufficiently specific, when taken in connection with the statute.⁴⁰

2443 Funds, lack of

An appropriation for a specific purpose is valid notwithstanding the lack of funds in the county treasury to meet it.⁴¹

³⁴ *People v. Cairo, V. & C. Ry. Co.*, 237 Ill. 314, 316.

³⁵ *People v. Illinois Central R. Co.*, 237 Ill. 324, 326, 327 (1908).

³⁶ *People v. Bowman*, 253 Ill. 241.

³⁷ *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 213 Ill. 200.

³⁸ *People v. Bowman*, 253 Ill. 238; Pars. 284, 285 and 286, Election law (Hurd's Stat. 1908, p. 981).

³⁹ *People v. Bowman*, 253 Ill. 239.

⁴⁰ *People v. Bowman*, 253 Ill. 242.

⁴¹ *People v. Chicago & Northwestern Ry. Co.*, 249 Ill. 170, 174 (1911).

2444 General fund

A county tax levy for a "general fund" is invalid because of the insufficiency of the designation of the purpose of the tax.⁴²

2445 Incidental and contingent

An item for a certain purpose includes incidental expenses, and if such expenses are not strictly incidental, they must be separately stated.⁴³ A small amount levied for contingent or incidental expenses is not unlawful, in the absence of an objection specifically questioning the amount of the levy.⁴⁴ One-ninth of the total tax for a specified year cannot be levied for "contingent general expenses" of a county.⁴⁵

Courts take judicial notice of the size and population of taxing municipalities, in determining whether the amount of a tax for "contingent expenses" or other similar designation, is reasonable and not excessive under so general a designation.⁴⁶

2446 Janitor's salary

A janitor is not a county officer and his salary should not be included with salaries allowed to county officers.⁴⁷

2447 Judiciary and boarding prisoners

A tax levy for "judiciary and boarding prisoners" is invalid.⁴⁸

2448 Jury service

An item for "jury service and witness fees" is a sufficient designation of the purpose for which the tax is levied.⁴⁹

2449 Levy

A county tax may be levied on any day during the September session of the county board, although the session is continued by adjournments for several months.⁵⁰

⁴² *People v. Illinois & Indiana R. Co.*, 231 Ill. 377, 379 (1907); *People v. Cleveland, C., C. & St. L. Ry.*, 231 Ill. 211.

⁴³ *People v. Kankakee & Southwestern R. Co.*, 231 Ill. 109, 110 (1907).

⁴⁴ *People v. Cairo, V. & C. Ry. Co.*, 247 Ill. 360, 363 (1910); Sec. 8, art. 13, c. 139, Hurd's Stat.; *People v. Illinois Central R. Co.*, 237 Ill. 324, 326 (1908), overruling *People v. Toledo, St. L. & W. R. Co.*, 231 Ill. 501.

⁴⁵ *People v. Chicago, B. & Q. R. Co.*, 253 Ill. 100, 101 (1912); Sec. 121, c. 120, Hurd's Stat. 1909, p. 1846.

⁴⁶ *People v. Chicago, B. & Q. R. Co.*, 253 Ill. 103.

⁴⁷ *People v. Cincinnati, L. & C. Ry. Co.*, 247 Ill. 506, 508 (1910).

⁴⁸ *People v. Toledo, St. L. & W. R. Co.*, 231 Ill. 502.

⁴⁹ *People v. Illinois Central R. Co.*, *supra*.

⁵⁰ *Bowyer v. People*, 220 Ill. 93, 94 (1906).

2450 Miscellaneous purposes

A city tax for "miscellaneous" purposes is void.⁵¹

2451 Ordinary expenses

A county tax levy to pay "ordinary expenses" of the county is invalid.⁵²

2452 Paupers and poor

A tax levy by a county for "care of paupers \$.," and for "salaries of officers \$.," is sufficiently specific.⁵³ Under the item of "care of paupers" may be included expenses for caring for transient persons requiring temporary relief for which no charge could be made to any particular town, and the expenses connected with the poor house and its maintenance.⁵⁴

A levy for "supplies and repairs of the poor farm and salary of the warden" should be separated.⁵⁵ So, a levy for pauper accounts and poor-master should be made in separate items.⁵⁶

2453 Printing

"Printing and stationery" sufficiently designates the levy for such items.⁵⁷

2454 Public building account

A county tax levy for "public buildings account" does not sufficiently specify the purpose of the levy and is invalid.⁵⁸

2455 Resolution, requisites

A resolution of the board of supervisors which fails to state separately the amounts required for the various purposes cannot be made the basis of a valid tax.⁵⁹

⁵¹ *People v. Cairo, V. & C. Ry. Co.*, 237 Ill. 317.

⁵² *People v. Belleville & Eldorado R. Co.*, 232 Ill. 454, 455 (1908); *People v. Cairo, V. & C. Ry. Co.*, 231 Ill. 438, 441 (1907).

⁵³ *People v. Chicago & E. I. R. Co.*, 248 Ill. 118, 119 (1911).

⁵⁴ *People v. Cincinnati, L. & C. Ry. Co.*, 247 Ill. 509.

⁵⁵ *People v. Cairo, V. & C. Ry. Co.*, 237 Ill. 316.

⁵⁶ *People v. Illinois Central R. Co.*, 237 Ill. 326.

⁵⁷ *People v. Illinois Central R. Co.*, *supra*; *People v. Cairo, V. & C. Ry. Co.*, *supra*.

⁵⁸ *People v. Cairo, V. & C. Ry. Co.*, 243 Ill. 219.

⁵⁹ *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 213 Ill. 559.

2456 Salaries of county appointees

A stated amount levied for "salaries of county appointees" is too indefinite.⁶⁰

2457 Salaries of officers

It is no objection to a county tax for salaries of county officers, deputies and clerks, because it is in one item.⁶¹ A levy for "salaries of the officers" sufficiently describes the purpose of the tax.⁶² The salary of a stenographer is not allowable under the salaries of county officers.⁶³

An objection that the statement of the purpose of the tax includes officers who are not properly such, and that it also embraces salaries of officers who are paid from fees, must be clearly proved.⁶⁴

2458 State institutions

A county is required to contribute to the support of state institutions, such as insane hospitals; and a levy of a stated amount for "state institutions" is sufficiently specific.⁶⁵

2459 Unpaid claims

A county levy for the payment of "unpaid claims" is invalid.⁶⁶

2460 Workhouse

The designation of "workhouse" as a purpose for a county levy is insufficient.⁶⁷

DRAINAGE ASSESSMENT

2461 Scope of objections

Since 1901 amendment to the Farm Drainage act, the first opportunity an owner has to object to a drainage special assessment is upon application for judgment and order of sale, and unless the statute has been strictly complied with the assessment is void.⁶⁸

⁶⁰ *People v. Bowman*, 253 Ill. 242.

⁶¹ *People v. Illinois Central R. Co.*, 237 Ill. 325.

⁶² *People v. Kankakee & Southwestern R. Co.*, 237 Ill. 363.

⁶³ *People v. Cincinnati, L. & C. Ry. Co.*, 247 Ill. 508.

⁶⁴ *People v. Chicago, Indiana and*

Southern R. Co., 248 Ill. 126, 133 (1911).

⁶⁵ *People v. Bowman*, 253 Ill. 242.

⁶⁶ *People v. Toledo, St. Louis & Western R. Co.*, 231 Ill. 500.

⁶⁷ *People v. Bowman*, 253 Ill. 241.

⁶⁸ *People v. Carr*, 231 Ill. 502, 507 (1907).

2462 Advance indebtedness

A drainage assessment is void if it is based upon an unlawfully created indebtedness, or an indebtedness which was created in advance of the assessment.⁶⁹

2463 Amount necessary and required

That the assessment is in excess of the required and the necessary amount is a valid objection upon an application for judgment and sale for a delinquent drainage assessment.⁷⁰

2464 Appeal pending

An appeal lies to the county court from the decision of the drainage commissioners upon the classification of the lands; and where an appeal has been perfected, the commissioners have no authority to levy and extend a tax against the land owner who has appealed, until the disposal of the appeal.⁷¹

2465 Appropriation ordinance

An appropriation ordinance of a sanitary district may be passed at any time, provided a copy of it is certified and filed with the county clerk before the second Tuesday in August.⁷²

2466 Benefits

Upon an application for judgment and order of sale for a delinquent drainage tax it is proper to object that the land has been assessed more than it will be benefited by the work done and proposed to be done. The original classification of land for drainage purposes merely fixes the proportion that the respective parcels of land shall bear of any lawful levy that might be made.⁷³

2467 Bonds

Irrespective of 1909 amendment of the Revenue act, sanitary districts have power, in good faith and for a lawful purpose, to issue bonds maturing at any time within twenty years.⁷⁴

⁶⁹ *People v. Kuns*, 248 Ill. 42, 44 (1910).

⁷⁰ *People v. Welch*, 252 Ill. 167, 173, 174 (1911); Secs. 2, 26, Farm Drainage act (Ill.).

⁷¹ *People v. Weatherhead*, 253 Ill. 85, 86 (1912); Pars. 98, 99 and 102, c. 42, Hurd's Stat. 1909.

⁷² *People v. Bowman*, 253 Ill. 247; Sec. 17, Sanitary District act (Ill.); Sec. 122, Revenue act (Ill.).

⁷³ *People v. Brown*, 253 Ill. 578, 580 (1912); Sec. 31, art. 4, Const. 1870 (Ill.); *People v. Welch*, 252 Ill. 172; Sec. 26, Farm Drainage act (Ill.).

⁷⁴ *People v. Bowman*, 253 Ill. 248; Sec. 2, Revenue act as amended in 1909 (Ill.).

2468 Certificate of levy

An objection to the sufficiency of the certificate of levy is proper upon an application for judgment and order of sale for a delinquent drainage tax.⁷⁵

2469 Classification roll, change

On an application for judgment and order of sale for a delinquent drainage tax, the land owner may question the validity of the classification roll adopted by the county court under void proceedings when such proceedings were not brought in the county court by the objector and it is his first opportunity to make the objection.⁷⁶ The making of a written statement by one or a majority of the commissioners that the classification which was made by them was not according to right and justice will not affect that classification, unless it be done in regular meeting of the commissioners and a record of it made and preserved. Nor can a classification be changed by the mere written statement of certain land owners.⁷⁷

2470 Classification, fraud

Fraud in the changing of a classification may be urged upon an application for judgment and order of sale, if the fraud does not merely relate to the commissioners' motive or to their want of proper judgment in making the classification.⁷⁸

2471 Confirmation of assessment

No confirmation of a drainage assessment is necessary other than that which operates as a confirmation when the assessment roll is filed with the town clerk as is provided by law.⁷⁹

2472 Contracts, publication

On an application for judgment and order of sale it is not too late to object to the illegal letting of a contract for the construction of the improvement.⁸⁰

⁷⁵ *People v. Brown, supra.*

⁷⁶ *Carr v. People*, 224 Ill. 160, 168 (1906).

⁷⁷ *People v. Welch*, 252 Ill. 176; Sec. 21, Farm Drainage act (Ill.).

⁷⁸ *People v. Welch*, 252 Ill. 171.

⁷⁹ *People v. Welch*, 252 Ill. 177.

⁸⁰ *Rogne v. People*, 224 Ill. 449, 450 (1906).

2473 Corporate existence

The corporate existence of a drainage district cannot be attacked collaterally.⁸¹

2474 Drains unconnected

The land owner cannot object on the ground that the drainage commissioners failed to attach the ditches of the district with the drains on his land.⁸²

2475 Including lands unlawfully

An objection that certain lands have not been legally included within the drainage district is valid if limited to proof that would show lack of jurisdiction in the drainage commissioners to make the levy.⁸³

2476 Interest, omission of

The omission to require the payment of interest due on the delinquent tax results to the benefit of the land owner and cannot be urged against the collection of the tax.⁸⁴

2477 Jurisdiction

An objection that the commissioners have failed to acquire jurisdiction over land owners at the time of making the classification should point out specifically who are the parties over whom the commissioners did not obtain jurisdiction.⁸⁵

2478 Meetings, jurisdiction

The meetings of the drainage commissioners cannot be held outside of the limits of the drainage district or sub-district.⁸⁶ The classification of land of a drainage district is void if the meetings of the commissioners for classification were held without the territorial limits of the drainage district, notwithstanding that such meetings were held at the town clerk's office and that the objector participated in some of the meetings thus held.⁸⁷

⁸¹ People v. Welch, 252 Ill. 176.

⁸² Shanley v. People, 225 Ill. 579, 583 (1907).

⁸³ People v. Welch, 252 Ill. 174.

⁸⁴ People v. Welch, 252 Ill. 178; Sec. 29, Farm Drainage act (Ill.).

⁸⁵ People v. Welch, 252 Ill. 177.

⁸⁶ People v. Kuns, 248 Ill. 43.

⁸⁷ People v. Camp, 243 Ill. 154, 155 (1909).

2479 Meetings, notice

A notice of the first meeting for the organization of a drainage district posted at three public places is all that is necessary, and the land owner is not entitled to any other or personal notice of the meeting.⁸⁸

2480 Notice or demand

In cases of drainage taxes or assessments extended upon a collector's book with state, county and other taxes, it is not necessary for the county collector to make a demand or give notice for the payment of the drainage tax or assessment.⁸⁹

2481 Organization

In a proceeding for the collection of a drainage assessment, no objection can be made to the legality of the organization of the drainage district.⁹⁰

2482 Outlets

The failure to provide an adequate outlet for the system of drainage cannot be urged upon an application for judgment and order of sale, as the remedy is by *mandamus* against the commissioners to compel them to perform their statutory duty in that respect.⁹¹

2483 Plans

The failure to file with the town clerk the plans of the proposed work cannot be urged against the collection of a drainage assessment.⁹²

2484 Statement of cost

Upon an application for judgment and order of sale an objection that no itemized statement of the cost of the work has been filed with the town clerk comes too late.⁹³

⁸⁸ Rogne v. People, *supra*.

⁸⁹ Waite v. People, 228 Ill. 173, 176 (1907).

⁹⁰ Rogne v. People, *supra*; Carr v. People, 224 Ill. 168. See Section 2473.

⁹¹ People v. Welch, 252 Ill. 177.

⁹² People v. Welch, 252 Ill. 176.

⁹³ People v. Welch, *supra*.

2485 Statute, validity

It is permissible, upon an application for judgment and order of sale for a delinquent drainage tax, to urge the constitutionality of the statute under which the assessment was made.⁹⁴

2486 Treasurer's report, verification

The drainage treasurer's omission to swear to his report cannot be urged on application for judgment and order of sale for delinquent drainage assessments.⁹⁵

2487 Work unauthorized

The nature of, and the authority for, the work to be done may be questioned upon an application for judgment and order of sale for a delinquent drainage tax.⁹⁶

DRAINAGE ADDITIONAL ASSESSMENT

2488 Jurisdiction, cost of work

Proceedings for an additional drainage assessment brought before a justice of the peace are void if the cost of the contemplated work exceeds the sum of two thousand dollars.⁹⁷

2489 Necessity of

Upon an application for judgment and order of sale to satisfy a second additional assessment, an objector may question the propriety or necessity of the assessment.⁹⁸

2490 Notice, defects

On an application for judgment and order of sale for an additional drainage assessment, a land owner who has not waived the defect may object that the notice required by statute is fatally defective.⁹⁹

2491 Library tax

A library tax may be levied for a series of years and voted upon at one election.¹⁰⁰

⁹⁴ People v. Brown, 253 Ill. 580.

⁹⁵ People v. Prust, 219 Ill. 116, 121 (1905).

⁹⁶ People v. Brown, 253 Ill. 581.

⁹⁷ Frank v. Rogers, 220 Ill. 206, 216 (1906).

⁹⁸ People v. Adair, 247 Ill. 398, 401 (1910).

⁹⁹ Frank v. Rogers, 220 Ill. 214.

¹⁰⁰ People v. Illinois Central R. Co., 240 Ill. 426, 428 (1909).

2492 Park tax, jurisdiction

The county and circuit courts have concurrent jurisdiction in special assessments for park purposes.¹⁰¹

2493 Park tax, law governing

The lien and the collection of a park assessment are governed by article 9 of the City and Village act and all amendments thereto including the Local Improvement act of 1897.¹⁰²

ROAD AND BRIDGE TAX

2494 Additional levy; authority, scope

The authorized purpose for which an additional levy may be voted is the "construction and repair of roads and bridges." An additional levy for any other purpose is unlawful.¹⁰³ The cost of the construction of bridges across ditches of a drainage district in a highway must be borne by the district, regardless of the law under which it was organized, and the highway commissioners cannot levy a tax for this purpose.¹⁰⁴ An additional levy cannot be made for the building of a new bridge, as that is a part of the ordinary expenses for which road and bridge taxes are levied.¹⁰⁵ The opening of new roads is not a lawful contingency under section 14 of the Road and Bridge act.¹⁰⁶ The repair of roads and bridges which has become necessary on account of heavy rainfalls is not a sufficient contingency to authorize an additional levy.¹⁰⁷

The damages for the laying out, widening, altering or vacating of roads must first have accrued, be allowed or awarded by the highway commissioners for some one or more of these purposes, and be duly recorded by the town clerk, before an additional tax can be levied for their payment.¹⁰⁸

¹⁰¹ *South Park Commissioners v. Pearce*, 248 Ill. 578, 582 (1911).

¹⁰² *Cummings v. People*, 213 Ill. 443, 448 (1905).

¹⁰³ *People v. Cleveland, C., C. & St. L. Ry. Co.*, 249 Ill. 160, 163 (1911); Sec. 119, Road and Bridge act (Ill.).

¹⁰⁴ *People v. Fenton & Thomson R. Co.*, 252 Ill. 374.

¹⁰⁵ *People v. Fenton & Thomson R. Co.*, *supra*; *People v. Kankakee & Seneca R. Co.*, 231 Ill. 491.

¹⁰⁶ *People v. Wabash R. Co.*, 248 Ill. 540, 544 (1911).

¹⁰⁷ *People v. Toledo, St. L. & W. R. Co.*, 249 Ill. 175, 177 (1911); Sec. 14, Road and Bridge act (Ill.); *People v. Elgin, J. & E. Ry. Co.*, 243 Ill. 546, 549 (1910).

¹⁰⁸ *People v. Cairo, V. & C. Ry. Co.*, 252 Ill. 395, 396 (1911); Secs. 10, 15, Road and Bridge act (Ill.).

The additional tax must be levied upon all of the property within the town, without regard to any other municipality within that town; and the tax must not be greater than the amount that is necessary to meet the contingency.¹⁰⁹

In levying an additional tax for road and bridge purposes, the commissioners of highways are the judges of the contingency; and a levy of such tax is valid if there is a substantial compliance with the statute authorizing it.¹¹⁰

Except in cases of emergency, an additional levy for road and bridge purposes should be authorized by the voters of a town under the labor system only at their annual meeting.¹¹¹

2495 Additional levy; certificate, sufficiency, amendment

Formerly, an additional levy for road and bridge purposes was void unless the highway commissioners' certificate stated a contingency which arose from some unusual or extraordinary event in the nature of a casualty, which did not happen regularly and in the ordinary course of nature.¹¹² The nature of the contingency calling for the additional levy was required to be stated with sufficient particularity to show the necessity of the levy and to enable the board of auditors and assessor to determine whether the purpose was within the provision of the statute.¹¹³ A general statement of such contingency was insufficient.¹¹⁴ If a certificate was insufficient, it was not amendable upon application for judgment and sale.¹¹⁵ A freshet which carried away and destroyed a bridge was regarded as a sufficient contingency upon which to base an additional tax;¹¹⁶ and this

¹⁰⁹ *People v. Peoria & Pekin Union Ry. Co.*, 232 Ill. 540, 549, 551 (1908).

¹¹⁰ *Cleveland, C. C. & St. L. Ry. Co. v. People*, 223 Ill. 17, 23 (1906).

¹¹¹ *People v. Chicago & Alton R. Co.*, 248 Ill. 417, 421 (1911); *People v. Chicago, I. & St. L. S. L. Ry. Co.*, 249 Ill. 102, 103 (1911); Sec. 10, art. 6, Township Organization act (Ill.); Sec. 119, Road and Bridge act as amended in 1909.

¹¹² *People v. Chicago, B. & Q. R. Co.*, 253 Ill. 104; *People v. Lake Erie & W. R. Co.*, 248 Ill. 32, 35 (1910); *People v. Wabash R. Co.*, 252 Ill. 316, 317 (1911); *People v. Kankakee & Southwestern R. Co.*, 231 Ill. 111; *People v. Peoria &*

Pekin Union Ry. Co., 232 Ill. 547; *People v. Cincinnati, Indianapolis & Western Ry. Co.*, 213 Ill. 506; Sec. 14, c. 121, Hurd's Stat. 1909.

¹¹³ *People v. Chicago & Eastern Illinois R. Co.*, 231 Ill. 454, 455 (1907); *People v. Cincinnati, Lafayette & Chicago Ry. Co.*, 231 Ill. 363, 364 (1907); *Toledo, St. Louis & Western R. Co. v. People*, 226 Ill. 557, 561 (1907); *St. Louis, Alton & Terre Haute R. Co. v. People*, 224 Ill. 155, 158 (1905).

¹¹⁴ *People v. Kankakee & Southwestern R. Co.*, 237 Ill. 366, 367.

¹¹⁵ *People v. Chicago, I. & S. R. Co.*, 248 Ill. 126, 131, 133 (1911).

¹¹⁶ *People v. Wabash R. Co.*, 252 Ill. 316.

was sufficiently expressed in a certificate which stated the contingency to have arisen from a "wash-out by unusual floods occurring at (specifying time and place) which could not have been foreseen or guarded against."¹¹⁷ No sufficient contingency was considered to have been shown by statements that the levy was needed for "building and repairing bridges," for "building of new bridges;"¹¹⁸ for the "sole purpose of paying damages and opening up new roads * * * and building bridges;"¹¹⁹ or for the "paying of an old iron bridge."¹²⁰

In 1911 the written consent of the board of town auditors and the assessor stating the reasons for an additional levy for road and bridge purposes was substituted for the requirement of the statement of a sufficient contingency for such a levy.¹²¹ By this amendment of the statute the town auditors and the assessor are vested with the discretion and final power to determine whether a sufficient reason has been shown for making an additional levy for road and bridge purposes.¹²²

2496 Bonds, payment of

A tax for the payment of bonds is distinct and separate from a hard road tax; it must be actually levied as such; it may be for the full amount of one dollar on each \$100 of the assessed valuation of the taxable property; and it may be levied in addition to the hard road tax.¹²³

2497 Cash and labor systems

A levy for road and bridge purposes must be made under the particular system the town has adopted, the Labor and Cash systems for levying taxes being separate and distinct.¹²⁴

¹¹⁷ *People v. Illinois Central R. Co.*, 249 Ill. 142, 144 (1911).

¹¹⁸ *People v. Wabash R. Co.*, 248 Ill. 544; *People v. Chicago & Eastern Illinois R. Co.*, 231 Ill. 455.

¹¹⁹ *People v. Toledo, St. Louis & Western R. Co.*, 231 Ill. 390, 391 (1907).

¹²⁰ *People v. Cairo, V. & C. Ry. Co.*, 231 Ill. 440, 441.

¹²¹ *People v. De Kalb & Great Western R. Co.*, 256 Ill. 290, 292 (1912).

¹²² *People v. Cleveland, C., C. & St. L. Ry. Co.*, 256 Ill. 423, 424 (1912); Sec. 14, Road and Bridge act as amended in 1911.

¹²³ *People v. Cairo, V. & C. Ry. Co.*, 252 Ill. 329, 331 (1911); Sec. 4a, Hard Roads act (1909 Laws, p. 327).

¹²⁴ *People v. Toledo, St. L. & W. R. Co.*, 249 Ill. 177.

2498 Certificate, requisites

The road and bridge tax certificate of levy may state only the amount, in dollars and cents, that is necessary to be raised; or, it may fix a per cent upon each one hundred dollars of taxable property.¹²⁵ The certification of a certain rate per cent in place of a specific amount for road and ditch damages, is not a serious objection upon an application for judgment and order of sale, unless the result produced by the rate per cent is substantially different from that which would have been produced had the amount been stated.¹²⁶ Neither the purpose for which a road tax is levied nor its rate per cent is required to be stated in the certificate, as the purpose and rate per cent are ascertainable from the commissioners of the district.¹²⁷ In a tax for road and bridge purposes ordinary repairs are included.¹²⁸

2499 Certificate, delivery

A road and bridge tax is not invalid simply because the certificate of levy is not delivered to the supervisors five days before the annual town meeting of the board of supervisors, if the certificate is in fact delivered and is acted upon by the board.¹²⁹

2500 Certificate, filing

In Illinois, road and bridge taxes are levied under the Cash or the Labor system. Where the tax is levied under the Cash system, the commissioner's certificate must be filed with the town clerk, which must remain with him, and he must certify the amount of the tax to the county clerk for the extension of the tax, both certificates being jurisdictional.¹³⁰ A road and bridge tax is invalid if the original certificate of the levy in place of a certified copy thereof is filed with the county clerk.¹³¹

Where the tax is levied under the Labor system, the original

¹²⁵ *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 212 Ill. 518, 527 (1904); *Chicago, Peoria & St. L. Ry. Co. v. People*, 214 Ill. 471, 474 (1905).

¹²⁶ *People v. Chicago & Alton R. Co.*, 248 Ill. 87, 89 (1910); Secs. 15, 16, Road and Bridge act (Hurd's Stat. 1909, p. 1914).

¹²⁷ *People v. Chicago & Alton R. Co.*, 247 Ill. 373, 374, 375 (1910); *Illinois Central R. Co. v. People*, 213 Ill. 174, 176 (1904).

¹²⁸ *People v. Cincinnati, Lafayette & Chicago Ry. Co.*, 231 Ill. 363, 364 (1907).

¹²⁹ *People v. Chicago & Eastern Illinois R. Co.*, 214 Ill. 190, 194 (1905).

¹³⁰ *People v. Woodyard*, 245 Ill. 387, 390 (1910); Sec. 3, Hard Roads act 1883; Sec. 4, art. 12, Township Organization act.

¹³¹ *People v. Elgin, J. & E. Ry. Co.*, 243 Ill. 546, 549 (1910).

certificate sent by the commissioners must be filed with the county clerk for the extension of the tax.¹³² In townships under the Labor system a road and bridge tax is invalid unless made from the original certificate of the highway commissioners, or a majority of them, delivered to the supervisor and by him submitted to the county board.¹³³

The omission by highway commissioners to make their certificate for a road tax levy, and to deliver or cause the same to be delivered to the road district clerk, or the omission by such clerk to keep on file such certificate and to certify the levy to the county clerk is a valid objection to a tax to be raised for district purposes.¹³⁴

2501 Certificate, amendment

It is proper to permit a certificate of levy of a road and bridge tax to be amended to correspond with the record of the highway commissioners after such record has also been amended.¹³⁵ A certificate of a road and bridge tax levy signed by the town clerk instead of the highway commissioners is absolutely void and cannot be amended upon the hearing of objections to such tax.¹³⁶

2502 Change of township organization, proof

An objection that the township was operating under a new system at the time that a tax was levied must be supported by proof that the election which abolished the former system was based upon a proper petition and statutory notice, and by showing the result of that election.¹³⁷

2503 County aid, authority

In the construction of bridges, county aid may be granted under the statute for each bridge of which the cost amounts to more than twelve cents on the one hundred dollars on the last assessment roll of the township. A township has no authority

¹³² *People v. Kankakee & Southwestern R. Co.*, 218 Ill. 588, 591 (1905).

¹³³ *Toledo, St. Louis & Western R. Co. v. People*, 226 Ill. 557, 559 (1907).

¹³⁴ *Illinois Southern Ry. Co. v. People*, 215 Ill. 123, 124, 127 (1905).

¹³⁵ *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 212 Ill. 525.

¹³⁶ *People v. Chicago & Eastern Illinois R. Co.*, 248 Ill. 596, 601 (1911).

¹³⁷ *People v. Illinois Central R. Co.*, 252 Ill. 262, 265 (1911).

to grant aid upon the aggregate cost of all the bridges in the town.¹³⁸

2504 County aid, petition

A petition for county aid in the construction of bridges and approaches thereto should show that the cost of each bridge or approach will be more than twelve cents on the one hundred dollars on the latest assessment roll of the township.¹³⁹

2505 County aid; levy, scope

A levy by the county board for "bridges" includes the building of new bridges, the repair of old bridges, and the construction of approaches or abutments.¹⁴⁰

2506 Hard roads; petition, requisites

The legal qualifications of the signers need not be stated in a petition for a vote for or against levying a hard road tax, if the signers in fact are legally qualified and the petition is otherwise in full compliance with the requirements of the statute.¹⁴¹

2507 Hard roads; notice, ballot

The vote upon a petition for a particular kind of a hard road, as gravel, rock, macadam or other hard road, may be confined by the notice and ballot to the road prayed for, and must not be extended to other classes of roads.¹⁴²

2508 Hard roads; levy, amount

The total tax that may be levied under the Hard Roads act cannot exceed one dollar on each one hundred dollars assessed valuation of all of the taxable property in any township in counties under the township organization; and this limitation cannot be avoided by holding more than one election to authorize the improvement of different roads.¹⁴³

¹³⁸ *People v. Chicago & Northwestern Ry. Co.*, 249 Ill. 170, 172 (1911); Sec. 19, Road and Bridge act (Hurd's Stat. 1909, p. 1915).

¹³⁹ *People v. Chicago & Northwestern Ry. Co.*, 249 Ill. 173.

¹⁴⁰ *People v. Chicago & Northwestern Ry. Co.*, *supra*.

¹⁴¹ *People v. Kankakee & Seneca R. Co.*, 248 Ill. 114, 116 (1911); Hurd's Stat. 1908, p. 1873.

¹⁴² *People v. Kankakee & Seneca R. Co.*, 248 Ill. 117.

¹⁴³ *People v. Cairo, V. & C. Ry. Co.*, 252 Ill. 329, 331 (1911); Sec. 1, Laws 1909, p. 327.

2509 Hard roads; levy, extent

A hard road tax levy may be made for a lesser period than five years.¹⁴⁴

2510 Hard roads; certificate, sufficiency

A commissioners' certificate which certifies to a levy for "hard" roads is not inconsistent with a petition and vote for "gravel" roads, as a gravel road is a hard road.¹⁴⁵

2511 Hard roads; certificate, filing

A certified copy of the highway commissioners' certificate of levy may be filed at any time before the tax has to be extended. A duplicate certificate is an original and is insufficient authority for the extension of this tax.¹⁴⁶

2512 Hard roads; record

The recording of proceedings of a hard road tax levy in the town clerk's instead of the highway commissioners' record, does not invalidate the tax.¹⁴⁷

2513 Overseer's affidavit

The omission to appoint an overseer of highways and to obtain his affidavit of paid and unpaid taxes is fatal to a road and bridge tax.¹⁴⁸

2514 Record requisites

The record of a road and bridge tax must show the specific purposes for which the commissioners are authorized to make the levy.¹⁴⁹

2515 Special tax; nature, validity

The levy of a special tax of one dollar on each one hundred dollars assessed valuation for five years, under the authority of a

¹⁴⁴ People v. Robeson, 253 Ill. 456, 460 (1912).

¹⁴⁵ People v. Robeson, 253 Ill. 458.

¹⁴⁶ People v. Robeson, 253 Ill. 459.

¹⁴⁷ People v. Robeson, *supra*.

¹⁴⁸ Cincinnati, Indianapolis & Western Ry. Co. v. People, 213 Ill. 559.

¹⁴⁹ People v. Chicago & Eastern Illinois R. Co., 214 Ill. 197.

special election, is permissible and creates an independent fund which is not to be applied to the payment of bonds issued to borrow money for hard roads, but it is to be expended upon the roads described in the petition for the election to authorize the tax.¹⁵⁰

SCHOOL TAX

2516 Additional levy

An additional school tax levy for repairing, grading and tiling around a school house must be made for school and not building purposes.¹⁵¹

2517 Authority, limitation

No valid school tax can be levied in excess of the limit fixed by the constitution.¹⁵² The constitutional taxing power of a school district cannot be increased by the establishment of different boards of education.¹⁵³

2518 Building purposes, proof

The school directors may make such levies as they, within their discretion, deem necessary from time to time to build or to pay for a school house that they were authorized to build by a majority vote, provided that they do not exceed the statutory limit of a half per cent, where the character and price of the building were not determined by the vote taken.¹⁵⁴ School authorities are not required to submit to voters the cost of a schoolhouse to be erected but only for authority to erect the building.¹⁵⁵ A school tax may be levied for the purpose of paying for a school house in process of construction, the erection of which had been previously authorized by vote of the people.¹⁵⁶ A school levy for "building purposes" is invalid, if the tax is intended for repairs, unless there is proof showing that the two items when taken

¹⁵⁰ *People v. Toledo, P. & W. Ry. Co.*, 248 Ill. 105, 110 (1910); *Hurd's Stat.* 1909, p. 1955.

¹⁵¹ *People v. Toledo, St. L. & W. R. Co.*, 242 Ill. 515, 517, 518 (1909).

¹⁵² *People v. Toledo, Peoria & Western Ry. Co.*, 229 Ill. 327, 329 (1907).

¹⁵³ *People v. Read*, 233 Ill. 351, 352 (1908).

¹⁵⁴ *People v. Peoria & Eastern Ry. Co.*, 216 Ill. 221, 228, 229 (1907).

¹⁵⁵ *People v. St. Louis, Alton & Terre Haute R. Co.*, 230 Ill. 61, 64 (1907).

¹⁵⁶ *People v. Toledo, St. L. & W. R. Co.*, 242 Ill. 517.

together, do not exceed the limit of taxation for "school purposes." ¹⁵⁷

To overcome the *prima facie* validity of a school tax for building purposes which has been levied in proper form, it is necessary to show that no building was in fact done, that none was contemplated or authorized, and that no building bonds and bills were due and unpaid. ¹⁵⁸

2519 Certificate, waiver

An objection to the form of certificate of a school levy may be waived by stipulation. ¹⁵⁹

2520 Certificate, amendment

Upon objection to a school tax for want of a sufficient certificate, it is proper to permit an amendment of the certificate if there is evidence on which to base the amendment, such as the showing of the presence of members who failed to sign the certificate as required. ¹⁶⁰

2521 Purpose, sinking fund

A school tax may be levied annually for the purpose of creating a sinking fund with which to pay building bonds when they mature, which tax when included in the levy for "building purposes" must not exceed, in the aggregate, the constitutional and statutory limit. ¹⁶¹

SPECIAL TAX AND ASSESSMENT

2522 Objections, scope

The only appropriate objections to an application for judgment and order of sale are those which question the jurisdiction of the county court to render the judgment of confirmation and which appear upon the face of the record. ¹⁶² An objection

¹⁵⁷ Illinois Southern Ry. Co. v. People, 215 Ill. 130.

¹⁵⁸ People v. Elgin, J. & E. Ry. Co., 255 Ill. 269, 270 (1912).

¹⁵⁹ St. Louis, Alton & Terre Haute R. Co. v. People, 225 Ill. 418, 423 (1907).

¹⁶⁰ Illinois Southern Ry. Co. v. People, 215 Ill. 129.

¹⁶¹ St. Louis, Alton & Terre Haute

R. Co. v. People, 225 Ill. 422; People v. Peoria & Eastern Ry. Co., 216 Ill. 227.

¹⁶² People v. Belz, 252 Ill. 296, 297, 298 (1911); People v. Martin, 243 Ill. 284, 286 (1910); People v. Seaman, 239 Ill. 611, 614 (1909); People v. Illinois Central R. Co., 213 Ill. 367, 369 (1905).

which could have been raised at the hearing on the confirmation of the assessment and which does not go to the jurisdiction of the court, cannot be urged on such an application except in proceedings under the Sidewalk act.¹⁶³ Mere informality or omission which could have been corrected if the point had been specifically raised before, cannot be urged upon the application.¹⁶⁴

2523 Benefits

The municipality's determination that a sidewalk shall be constructed by special taxation is a determination, under the Sidewalk act of 1875 that the property so taxed is benefited to the extent of the special tax, and no objection raising the question of benefits that would be tryable by jury can be urged upon application for judgment for delinquent taxes;¹⁶⁵ but the determination of benefit does not extend to any damages which might result to the property by reason of a change of grade in the construction of the sidewalk.¹⁶⁶

2524 Certificate of completion

A special assessment does not become delinquent until the filing of a certificate of completion and an acceptance of the work and its approval by the court by a finding that the improvement conforms substantially to the requirements of the improvement ordinance; and this proceeding cannot be obviated by entering into bond for the completion of the improvement.¹⁶⁷ A judgment approving a certificate of completion and acceptance of a local improvement is final and conclusive upon all parties, and is not appealable or reviewable upon error.¹⁶⁸

2525 Certificate of first voucher

A special assessment is not delinquent until the local improvement board's certificate of the first voucher is filed in the cause in which the assessment shall be confirmed; but the mere

¹⁶³ *People v. Wiemers*, 225 Ill. 17, 19 (1907).

¹⁶⁴ *People v. Prust*, 219 Ill. 116, 120 (1905).

¹⁶⁵ *Harris v. People*, 218 Ill. 439, 443 (1905).

¹⁶⁶ *Grant Park v. Trah*, 218 Ill. 516, 518 (1905).

¹⁶⁷ *People v. Conway*, 253 Ill. 140, 145 (1912); Sec. 84, Local Improvement act as amended in 1903; *Gage v. People*, 219 Ill. 634, 637 (1906).

¹⁶⁸ *People v. Martin*, 243 Ill. 284, 289, 290 (1910).

failure to file this certificate within thirty days, as required by statute, will not prevent the delinquency from arising if proper proceedings are taken after it has been filed.¹⁶⁹

2526 Contract, presumption

An objection to the legality of a contract for an improvement must be made in apt time and to the proper authorities.¹⁷⁰ In the absence of evidence to the contrary, it will be presumed that the first step to let the contract was taken within the time provided by statute.¹⁷¹

2527 Demand, nonresident

A demand upon a nonresident property owner for the payment of a special tax may be made by registered letter.¹⁷²

2528 Engineer's estimate

The sufficiency of an engineer's estimate cannot be questioned upon an application for judgment and order of sale.¹⁷³

2529 Improvement different

On an application for judgment and order of sale it is permissible to object on the ground that the improvement constructed is different from that provided for in the ordinance.¹⁷⁴ But a mere difference in the quality of the material or a deviation in the workmanship cannot be urged upon the application. A departure from the contract must be sufficient to amount to a new and different improvement from that called for by the ordinance.¹⁷⁵

Since the act of 1901 amending section 66 of the Local Improvement act the acceptance of the work by the local improvement board is conclusive upon an application by the collector for judgment and order of sale; but this act has no retrospective operation.¹⁷⁶

¹⁶⁹ Gage v. People, 221 Ill. 527, 529 (1906).

¹⁷⁰ Gage v. People, 213 Ill. 468, 471 (1905).

¹⁷¹ Gage v. People, 213 Ill. 468, 469 (1905).

¹⁷² Marshall v. People, 219 Ill. 99, 101 (1905).

¹⁷³ Noonan v. People, 221 Ill. 567, 570 (1906).

¹⁷⁴ People v. Lyon, 218 Ill. 577, 578 (1905); Phillips v. People, 218 Ill. 450, 453 (1905).

¹⁷⁵ People v. Bridgeman, 218 Ill. 568, 570 (1905).

¹⁷⁶ People v. Gage, 233 Ill. 447, 449 (1908).

2530 Instalments, objections, nature

An application for judgment and order of sale for the non-payment of special assessment instalments is a collateral proceeding in which no objections are urgeable that could have been properly raised upon the application for judgment of confirmation of the special assessment.¹⁷⁷

2531 Interest

A failure to comply with section 42 of the Local Improvement act, fixing the time when a special assessment instalment should draw interest, is not fatal if the objector is not injured by the omission.¹⁷⁸

2532 Jurisdiction, person

Upon an application for judgment and order of sale the want of jurisdiction in the court over the person of the land owner may be urged for the first time, on the ground that the orders and judgments entered in the proceeding of confirmation of the assessment, without jurisdiction, are void and may be attacked at any time before any court and in a collateral proceeding.¹⁷⁹

2533 New assessment, premature

The premature spreading of a new assessment cannot be urged upon an application for judgment and order of sale because such an objection is waived if not interposed in the proceeding for the confirmation of the assessment.¹⁸⁰

2534 Notice, validity of statute

The provisions of the Local Improvement act relating to notice are valid, although they do not provide for notice to the property owners.¹⁸¹

¹⁷⁷ *People v. Walleck*, 254 Ill. 79 (1912); Sec. 66, Local Improvement act (Hurd's Stat. 1909, p. 471).

¹⁷⁸ *Gage v. People*, 219 Ill. 637.

¹⁷⁹ *Payson v. People*, 175 Ill. 267 (1898); *People v. Dunn*, 247 Ill. 410, 414 (1910).

¹⁸⁰ *Wagg v. People*, 218 Ill. 337, 338 (1905).

¹⁸¹ *Gage v. Chicago*, 225 Ill. 135, 137 (1907).

2535 Notice to property owners

A judgment and order of sale for delinquent taxes cannot be based upon a special assessment of which no notice was given to the property owners interested to afford them an opportunity to be heard upon the assessment roll.¹⁸² Notice of a special assessment sent to the person appearing on the collector's books of the preceding year as owner of the property is sufficient, although someone else may be the real owner.¹⁸³

2536 Notice of conformation

The failure of a property owner and objector to receive notice of an application for confirmation of a special assessment is jurisdictional and may be urged on an application for judgment and order of sale.¹⁸⁴ Upon such an application it is a valid objection that an insufficient notice was given of the application for the confirmation of the assessment, notwithstanding the recital in the confirmation judgment that there was due service of notice, if the affidavit or proof of service shows that no such service was made.¹⁸⁵

2537 Notice of ordinance

The absence from the confirmation proceedings of an affidavit of service of notice of the passage of a sidewalk ordinance and the want of proof of the giving of the statutory notice to lay or repair the sidewalk are not jurisdictional in a collateral proceeding, even when the confirmation judgment has been rendered by default.¹⁸⁶

2538 Notice of rebate

Notice to the property owners of the application for a rebate order is not necessary where an assessment is payable in a single payment.¹⁸⁷

¹⁸² *People v. Phinney*, 231 Ill. 180, 185 (1907).

¹⁸³ *People v. Illinois Central R. Co.*, 213 Ill. 367, 369 (1905).

¹⁸⁴ *Phillips v. People*, 218 Ill. 450, 451 (1905).

¹⁸⁵ *People v. Sargent*, 252 Ill. 104, 107 (1911); Secs. 41, 44, Local Im-

provement act (Ill.); *Dickey v. People*, 160 Ill. 633 (1896), obviated by statute.

¹⁸⁶ *People v. Belz*, 252 Ill. 299; Sec. 34, Local Improvement act (Hurd's Stat. 1909, p. 462).

¹⁸⁷ *People v. McMahon*, 224 Ill. 284, 286 (1906).

2539 Ordinance

Upon application for judgment and order of sale an adjudication of the invalidity of the improvement ordinance made in one case cannot be urged in another.¹⁸⁸ A mere defect in the improvement ordinance cannot be urged against its validity, or against the jurisdiction of the court, if the ordinance contains a specification of the nature, the character, the locality and a description of the improvement, although such an objection might be sustainable in the proceeding for the confirmation of the assessment.¹⁸⁹

2540 Owner's petition

The want of a sufficient property owners' petition for an improvement cannot be urged upon application for judgment and order of sale unless the insufficiency of the petition appears on the face of the record.¹⁹⁰ The omission to file the petition of abutting owners before passing a special assessment ordinance is not jurisdictional.¹⁹¹

2541 Res judicata

On application for judgment and order of sale all objections which are, or which might have been, raised in the original or new assessment proceeding are *res judicata*.¹⁹² So is the order of the court confirming the action of the board of local improvements *res judicata* upon the question of the substantial compliance with the local improvement ordinance.¹⁹³

2542 Tax list

In a special levy for the construction of a sidewalk, the making and filing with the city, town or village clerk of a special tax list against the property assessed, as required by statute, is jurisdictional; and the levy of such a tax is void without the list.¹⁹⁴

¹⁸⁸ Goldstein v. Milford, 214 Ill. 528, 532 (1905).

¹⁸⁹ People v. Brown, 218 Ill. 375, 378, 379 (1905).

¹⁹⁰ Goldstein v. Milford, 214 Ill. 531.

¹⁹¹ Phillips v. People, 218 Ill. 451.

¹⁹² People v. Judson, 233 Ill. 280, 282 (1908); Harman v. People, 214 Ill. 454, 456 (1905).

¹⁹³ People v. Cohen, 219 Ill. 200, 204 (1906).

¹⁹⁴ People v. Record, 212 Ill. 62 (1904).

2543 Variance; description of improvement, waiver

A variance of the description of the property in the delinquent list and the notice of publication cannot be raised, because no description of the improvement in the list or the notice is essential under Illinois law; but an objection that there is a substantial difference of description of the improvement in the ordinance from that advertised may be urged upon the application for judgment and order of sale.¹⁹⁵ A general appearance waives an objection on account of variance.¹⁹⁶

2544 Warrant, recall, continuance

After a special assessment had been confirmed the court has no power to recall a warrant for the collection of the assessment where the proceedings is not abandoned by the petitioner, or the judgment is not vacated or modified in any material respect; and if an order recalling the warrant is entered without authority it amounts to a refusal of the judgment of sale at that time and to a continuance of the application.¹⁹⁷

TOWN TAX

2545 Amounts

The amounts of taxes that are raised for town purposes need not be stated separately.¹⁹⁸

2546 Auditors' certificate; requisites, amendment, evidence

The certificate of the board of town auditors must show the action taken by the board at its meeting; but the mere omission to show such action may be supplied by amendment to conform to the actual facts, upon an application for judgment and order of sale.¹⁹⁹ The town board of auditors' certificates is not impeachable upon such an application by the record of the proceedings of the board kept by the town clerk, as the certificate and not the record is the basis for a certificate of the town clerk to the county clerk for the extension of a town tax.²⁰⁰

¹⁹⁵ *People v. Harper*, 244 Ill. 121, 124 (1910).

¹⁹⁶ *Waite v. People*, 228 Ill. 173, 177 (1907).

¹⁹⁷ *Noonan v. People*, 221 Ill. 569.

¹⁹⁸ *People v. Cairo, V. & C. Ry. Co.*, 237 Ill. 316, 317.

¹⁹⁹ *People v. Chicago, Indiana & Southern R. Co.*, 248 Ill. 126, 128, 129 (1911); Sec. 191, c. 120, Hurd's Stat. 1909.

²⁰⁰ *People v. Chicago, Indiana & Southern R. Co.*, 248 Ill. 129; Sec. 7, art. 13, c. 139, Hurd's Stat. 1909.

2547 Bonds, interest

A tax to pay interest or principal on township bonds must be based upon the certificate of the board of town auditors, who alone are authorized and are in duty bound to audit the claim or charge it against the town, and it cannot be levied by the voters at a town meeting.²⁰¹

2548 Future compensation and expenses

A town tax may be levied at an annual town meeting in anticipation of demands that will thereafter arise against the town for services rendered by its officers and for other charges of that character.²⁰²

2549 Misprision

The unnecessary use of the word "preceding," or its use in place of the word "succeeding" in a town record, is a misprision which may be disregarded.²⁰³

2550 Outstanding indebtedness

After a town has regularly created an indebtedness for the building of a town hall, its power with reference thereto is exhausted, and any tax to meet this indebtedness must be audited by the board of town auditors, and it must not be levied by vote at the annual town meeting.²⁰⁴

2551 Purpose

A levy for town taxes or a levy for city or village taxes must specify, in detail, the several purposes for which the tax has been levied.²⁰⁵ A town tax is invalid if it fails to specify the particular items for which it has been levied.²⁰⁶ A levy for "contingent expenses necessarily incurred for the use and benefit of the town," is sufficiently specific as to the purpose of the tax.²⁰⁷

²⁰¹ *People v. Chicago, B. & Q. R. Co.*, 248 Ill. 81, 86 (1910); Sec. 12, art. 9, Const. 1870 (Ill.); Sec. 20, Road and Bridge act (Ill.).

²⁰² *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 213 Ill. 204.

²⁰³ *People v. Kankakee & Seneca R. Co.*, 248 Ill. 114, 115 (1911).

²⁰⁴ *People v. Chicago & E. I. R. Co.*, 249 Ill. 549, 551 (1911).

²⁰⁵ *People v. Chicago, B. & Q. R. Co.*, 248 Ill. 86.

²⁰⁶ *Illinois Central R. Co. v. People*, 213 Ill. 177; *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 213 Ill. 200.

²⁰⁷ *People v. Chicago & E. I. R. Co.*, 249 Ill. 550, overruling *People v. Cleveland, C., C. & St. L. Ry. Co.*, 231 Ill. 212; *People v. Illinois, Indiana R. Co.*, 231 Ill. 379.

2552 Town clerk's certificate, requisites

It is not necessary that a town clerk's certificate should expressly specify each purpose for which a town tax has been levied, if a valid tax, showing each purpose, was in fact made, and this can be shown by the town record.²⁰⁸ Nor is it necessary that the certificate should state specifically what amount is levied for each purpose. The tax-payer may obtain this information from the certificate of the board of the town auditors on file with the town clerk.²⁰⁹

A town clerk's certificate is sufficient if it enables the county clerk to properly extend the town tax.²¹⁰ A certificate of a town clerk reciting the levy of an annual sum for "town purposes" is insufficient, but the defect in the certificate may be cured by attaching a statement of the town clerk specifying the purpose for which the amount is to be raised and naming the sum required for each purpose.²¹¹

2553 Town clerk's certificate, filing

The failure of the town clerk to file a certificate of a town levy with the county clerk is fatal to the extension of the tax, and cannot be cured by the subsequent filing of the certificate.²¹²

2554 Town clerk's certificate, amendment

On an application by the county collector for judgment against delinquent lands, a court may permit the amendment of a town clerk's certificate.²¹³ But the omission from a town clerk's certificate of the statement or showing, that the certificate is a true copy of the certificate of the highway commissioners is jurisdictional, and cannot be supplied by amendment after the tax has been extended by the county clerk. The statutory provision which authorizes the correction of errors, etc., is inapplicable to cases of an entire omission of a necessary step to be taken in levying a valid tax.²¹⁴

²⁰⁸ *People v. Chicago, B. & Q. R. Co.*, 252 Ill. 482, 484 (1911).

²⁰⁹ *People v. Cairo, V. & C. Ry. Co.*, 247 Ill. 360, 365 (1910).

²¹⁰ *People v. Cairo, V. & C. Ry. Co.*, 247 Ill. 362.

²¹¹ *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 213 Ill. 202; *St. Louis, Alton & Terre Haute R. Co. v. People*, 225 Ill. 419.

²¹² *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 213 Ill. 206.

²¹³ *People v. Kankakee & Southwestern R. Co.*, 237 Ill. 362, 366 (1908).

²¹⁴ *People v. Cairo, V. & C. Ry. Co.*, 248 Ill. 36, 39, 40 (1910).

2555 Village tax, appropriation ordinance

A village tax is invalid if it is not based upon an appropriation ordinance.²¹⁵ The statutory provision that an appropriation ordinance shall be passed within the first quarter of the fiscal year is mandatory, and the failure to comply with it invalidates the levy ordinance.²¹⁶

2556 Village tax, certified ordinance, amendment

A village tax is void if the original levy ordinance instead of a certified copy thereof, is filed with the county clerk.²¹⁷ The failure to file the proper ordinance cannot be remedied by an amendment.²¹⁸

GENERAL OBJECTIONS

2557 Admission and waiver

Objections to an application for judgment and order of sale must first be raised in the trial court;²¹⁹ and if so raised, the objections are waived, unless they are urged in the reviewing court.²²⁰ By filing specific objections, a party admits that there are no other objections.²²¹

2558 Appropriation

The fact that the amount levied is less than the amount appropriated is not a valid objection to the tax where the purpose for which the levy has been made is the same as the appropriation.²²²

2559 Bonds, constitutional limitation

Bonds which are made payable by general taxation and which are issued by a municipality to meet its proportionate share of

²¹⁵ *People v. St. Louis, Alton & Terre Haute R. Co.*, 230 Ill. 61, 64 (1907).

²¹⁶ *People v. McElroy*, 248 Ill. 574, 577 (1911); Sec. 2, art. 7, Cities and Villages act (Ill.).

²¹⁷ *People v. Kankakee & Southwestern R. Co.*, 218 Ill. 588, 590 (1905).

²¹⁸ *People v. Belleville & Eldorado R. Co.*, 232 Ill. 454, 457 (1908).

²¹⁹ *People v. Chicago, I. & St. L. S. L. Ry. Co.*, 243 Ill. 200, 221 (1909).

²²⁰ *People v. Chicago & E. I. R. Co.*, 214 Ill. 190, 193 (1905).

²²¹ *Neff v. Smyth*, 111 Ill. 100, 111 (1884).

²²² *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 213 Ill. 207.

benefits that will be derived from a local improvement constitute an indebtedness which must be within the five per cent constitutional limit.²²³

2560 Certificate of publication, sufficiency

An affidavit or certificate of publication is insufficient if it fails to state what was published and omits to certify the relation of the person who makes the certificate.²²⁴

2561 Certificate of publication, filing

A certificate of publication, under oath, together with a copy of the newspaper must be filed with the county court and not with the county clerk.²²⁵ The filing of the copy of the newspaper and the certificate of publication with the clerk of the county court is jurisdictional.²²⁶

2562 Certificate of tax levy, amendment

A certificate of a tax levy is amendable if the levy was made in substantial compliance with the statute and the defects to be remedied are purely formal; a certificate is not amendable if there was no substantial compliance with the statute under which the levy was made.²²⁷

2563 Defenses applicable to others

A legal levy of a tax against one tax-payer cannot be defeated by a defense which is available to another tax-payer.²²⁸

2564 Delinquent list; jurisdictional, waiver

A special tax for sidewalk purposes, or a road and bridge tax, is invalid if the collector had failed, at the time judgment is prayed for, to present to the county court a printed list of delinquent lands and lots, with the publisher's sworn certificate of publication, and to file the copy thereof as part of the records in said court.²²⁹ An objection to the sufficiency of the delin-

²²³ *People v. Chicago & Alton R. Co.*, 253 Ill. 191, 196 (1912); Sec. 12, art. 9, Const. 1870 (Ill.).

²²⁴ *McChesney v. People*, 174 Ill. 46, 49 (1898).

²²⁵ *Nowlin v. People*, 216 Ill. 543, 544 (1905).

²²⁶ *McChesney v. People*, 174 Ill. 50.

²²⁷ *People v. Chicago, Indiana & Southern R. Co.*, 248 Ill. 126, 132 (1911).

²²⁸ *Chicago, Indianapolis & Western Ry. Co. v. People*, 214 Ill. 305.

²²⁹ *Drennen v. People*, 222 Ill. 592 (1906); *People v. Chicago & E. I. R. Co.*, 214 Ill. 198.

quent list and the publication of notice, or an objection that no copy of the paper containing the delinquent list was filed and presented to the county court at the time judgment was prayed for, is jurisdictional and must be raised upon special appearance. The objection is waived by defending on the merits.²³⁰

2565 Delinquent list; requisites, description and notice

It is not necessary, under Illinois law, that the delinquent list shall set forth a description of the improvement; and if the list contains the description, the same may be considered as surplusage.²³¹ The delinquent list and the notice in a proceeding for judgment and order of sale must agree the same as a declaration and process.²³²

2566 Delinquent report, seal

A report by the city clerk of delinquent taxes must be in writing but not under seal.²³³

2567 Delinquent report, filing

A provision in an ordinance requiring the filing of a report of delinquent tax-payers with the county collector within a certain date, is substantially complied with if the report is filed before making application for judgment to the county court, although filed after the required date.²³⁴

2568 Description of property

A judgment and order of sale for a delinquent special assessment cannot be based upon a void description of the land.²³⁵ An assessment against property is a nullity if the description under which it was assessed, or the description under which it was returned delinquent, is so indefinite and ambiguous that the property cannot be located from the description by a competent surveyor.²³⁶

²³⁰ *People v. Scheifley*, 252 Ill. 486, 489 (1911); *Ottis v. Sullivan*, 219 Ill. 365, 368 (1906).

²³¹ *People v. Harper*, 244 Ill. 123.

²³² *People v. Harper*, 244 Ill. 122.

²³³ *Marshall v. People*, 219 Ill. 99, 103 (1905).

²³⁴ *Harris v. People*, 218 Ill. 439, 442 (1905).

²³⁵ *People v. Owens*, 231 Ill. 311, 312 (1907).

²³⁶ *People v. Colegrove*, 218 Ill. 545, 546 (1905); *People v. Cairo, V. & C. Ry. Co.*, 252 Ill. 397.

2569 Double taxation, railroad track

A tax which amounts to double taxation is invalid.²³⁷ The assessment of railroad track by the state board of equalization and also by the local assessors constitutes double taxation and is illegal.²³⁸

2570 Exemption, parsonage

The parsonage primarily occupied by the pastor and his family as a residence is used for secular and not for a religious purpose, and is not exempt from taxation. The 1905 amendment of section 2 of the Revenue act is unconstitutional in so far as the legislature attempts to exempt a parsonage.²³⁹

2571 Exemption, school property or funds

The exemption of school property or funds under the Illinois constitution of 1870 applies to gifts or grants made prior, and not subsequent, to the adoption of that instrument.²⁴⁰

2572 Exemption, school rents

Moneys received by school authorities from rentals of school lands are exempt from taxation.²⁴¹

EXTENSION AND REDUCTION**2573 Law governing, validity**

The extension of a tax should be made according to the law that is in force at the time the tax is extended by the county clerk.²⁴² The act concerning the extension of taxes is valid.²⁴³

2574 County clerk's power

The county clerk has power to determine and extend the rate per cent of taxation that will produce more than the net amount ordered to be levied.²⁴⁴

²³⁷ Chicago & E. I. R. Co. v. People, 218 Ill. 465.

²³⁸ People v. Illinois Northern Ry. Co., 248 Ill. 532 (1911).

²³⁹ People v. First Congregational Church, 232 Ill. 158 (1908).

²⁴⁰ Grosse v. People, 218 Ill. 342, 346 (1905).

²⁴¹ People v. Chicago, 216 Ill. 537, 542 (1905).

²⁴² People v. Toledo, St. L. & W. R. Co., 249 Ill. 175, 178 (1911).

²⁴³ People v. Chicago & E. I. R. Co., 248 Ill. 596, 597 (1911).

²⁴⁴ Chicago, Indianapolis & Western Ry. Co. v. People, 214 Ill. 304.

2575 Scaling, taxing district

The rates of the county, town and city taxes must be reduced in the same proportion that it is necessary to reduce the aggregate of all the rates of the tax levies, exclusive of the levies for state, village, levee, school building, high school and road and bridge purposes and for the payment of bonded indebtedness, to three per cent on each \$100 of the assessed valuation of the taxable property in the municipality, except that the rate of a tax levy for county purposes cannot be reduced below forty-five cents on each assessed valuation of the taxable property in the county, and that the rate of the tax levy for city purposes, exclusive of library, school and park purposes and taxes levied for the payment of the principal of and interest on bonded indebtedness, cannot be reduced below \$1.20 on each \$100 assessed valuation of taxable property in the city.²⁴⁵

To reduce and extend taxes, the county clerk is required to ascertain which taxing district or municipality has the highest aggregate per cent of tax levies, exclusive of taxes that by statute are exempt from reduction, and to bring down the same to three per cent of the assessed valuation of the taxable property upon which the taxes are to be extended. The rate thus fixed is the county rate to be uniformly applied throughout each taxing district within the county.²⁴⁶

A taxing district within the meaning of the Revenue act is a municipality which levies the tax to be scaled. Within this definition, the entire township and not merely a school district is a taxing district for the purpose of scaling.²⁴⁷

A tax is illegal to the extent that it includes an amount which should have been reduced under the statute.²⁴⁸

2576 Scaling, city tax

A tax levy for park and library purposes must be excluded before reducing the rate of a tax levy for city purposes, whether the levy is that of a city having a population of more or less than 150,000.²⁴⁹

²⁴⁵ *People v. Chicago & E. I. R. Co.*, 248 Ill. 598, 600; *Laws 1909*, p. 323 (Ill.).

²⁴⁶ *People v. Chicago & Alton R. Co.*, 248 Ill. 87, 90, 91 (1910); *Cicero v. Haas*, 244 Ill. 551, 556 (1910); *Laws 1909*, p. 323.

²⁴⁷ *People v. Chicago & Alton R. Co.*, 247 Ill. 458, 460 (1910); *Sec.*

2, *Juni Revenue act (Laws 1909*, p. 323).

²⁴⁸ *People v. Toledo, St. Louis & Western R. Co.*, 248 Ill. 489, 490 (1911).

²⁴⁹ *People v. Cairo, V. & C. Ry. Co.*, 248 Ill. 554, 558 (1911); *Sec. 2, Laws 1909*, p. 323.

2577 Scaling, hard road tax

Before reducing the rate, a hard road tax is to be deducted or excluded, the same being classed as a road and bridge tax.²⁵⁰

2578 Scaling, levee tax

A sanitary district tax is not a "levee tax" within the meaning of the statutory provision requiring certain exemptions in making reductions.²⁵¹

2579 Scaling, void tax

A void tax cannot form a part of the total taxes which are subject to a reduction, if they exceed three per cent.²⁵²

2580 Extending, road and bridge tax, valuation

In extending a road and bridge tax in towns under the Cash system, the county clerk must use the state board of equalization valuation, and not the county board of review valuation. The method of computing and extending the tax will not invalidate it if the rate arrived at is below the maximum rate allowed by law.²⁵³ An erroneous extension of a road and bridge tax does not render the entire levy void and uncollectible.²⁵⁴

2581 Extending, road and bridge special tax

For the payment of principal and interest on bonds issued for the construction and maintenance of hard roads, the county clerk with whom the bonds are registered should extend a tax each year at a rate sufficient to produce the amount which is necessary to pay the interest on all of the bonds and the principal of maturing bonds; which tax is separate and distinct of a special tax extended at the rate that is authorized and levied by highway commissioners.²⁵⁵

²⁵⁰ *People v. Cairo, V. & C. Ry. Co.*, 247 Ill. 360, 363 (1910); See. 2, Revenue act 1909.

²⁵¹ *People v. Chicago & Alton R. Co.*, 248 Ill. 417, 419 (1911); *Laws* 1909, p. 323.

²⁵² *People v. Cairo, V. & C. Ry. Co.*, 248 Ill. 36, 41 (1910).

²⁵³ *St. Louis, Alton & Terre Haute R. Co. v. People*, 225 Ill. 420, 424.

²⁵⁴ *Chicago, Indianapolis & Western Ry. Co. v. People*, 214 Ill. 304, 305.

²⁵⁵ *People v. Toledo, Peoria & Western Ry. Co.*, 248 Ill. 105, 111 (1910).

2582 Extending, rate of tax, fraction

A fraction of a cent in the rate is properly treated as one cent in extending the tax.²⁵⁶

2583 Forfeiture record

The Illinois Revenue act contemplates that a judgment and order of sale should be spread of record in the tax, judgment, sale, redemption and forfeiture record.²⁵⁷

2584 Jurisdiction, waiver

A general appearance waives objections to the jurisdiction.²⁵⁸

2585 Name, error in

A mere error in the name of a tax-payer does not invalidate a tax on personal property, where it appears, or it can reasonably be presumed, that the tax-payer had notice of the tax to which he objects.²⁵⁹

2586 Notice of application

The publication of the advertisement of an application for judgment and order of sale for delinquent taxes must specify all of the years for which the delinquent taxes are due.²⁶⁰ By filing general objections, an owner waives all defects in the notice of application for judgment.²⁶¹

2587 Ordinance

A constitutional provision relating to titles of acts has no application to municipal ordinances.²⁶²

2588 Organization

The organization of the municipality which levied the tax, the payment of which is sought to be enforced, cannot be ques-

²⁵⁶ St. Louis, Alton & Terre Haute R. Co. v. People, 224 Ill. 155, 156 (1906).

²⁵⁷ People v. Smythe, 232 Ill. 242, 246 (1908).

²⁵⁸ People v. Brown, 253 Ill. 578, 579 (1912); People v. Cairo, V. & C. Ry. Co, 243 Ill. 220; Neff v. Smyth, 111 Ill. 109.

²⁵⁹ People v. Cosmopolitan Fire Ins. Co., 246 Ill. 442, 448 (1910).

²⁶⁰ Drennen v. People, 222 Ill. 592, 594 (1906).

²⁶¹ People v. Warren, 231 Ill. 518, 520 (1907); People v. Cairo, V. & C. Ry. Co., *supra*.

²⁶² Harris v. People, 218 Ill. 442.

tioned upon an application for judgment and order of sale where there was an active *de facto* corporation, although the objection goes to the jurisdiction of the tribunal through whose agency the organization was effected. This rule is applicable to proceedings to enforce delinquent drainage taxes.²⁶³

2589 Ownership of property, burden of proof

The tax-payer has a right to show that he did not own the property that was assessed against him.²⁶⁴ An objector must show his interest in the property against which judgment is sought, when the land is not assessed in his name.²⁶⁵

2590 Payment of tax by others

A tax-payer cannot defeat the payment of a tax against him on the ground that the entire levy has been or will be paid in full by other tax-payers who fail to question its validity.²⁶⁶

2591 Personal property tax charged against real estate

A personal property tax cannot be charged against real estate without the town or district collector's notation and affidavit of the failure to collect the tax entered upon his book opposite the name of the person thus taxed.²⁶⁷

2592 Persons and property

The assessment must not be on the person or company, but on the property.²⁶⁸

2593 Publication of assessment

The failure to publish assessments in any of the modes provided by statute does not constitute a valid objection to the application for judgment and order of sale.²⁶⁹

²⁶³ *People v. Bowman*, 247 Ill. 276, 279 (1910); *People v. Pederson*, 220 Ill. 554, 559 (1906).

²⁶⁴ *People v. Cosmopolitan Fire Ins. Co.*, 246 Ill. 448.

²⁶⁵ *People v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.*, 248 Ill. 440, 441 (1911).

²⁶⁶ *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 212 Ill. 518, 528 (1904); *Cincinnati, Indi-*

anapolis & Western Ry. Co. v. People, 212 Ill. 546 (1904).

²⁶⁷ *People v. Scheifley*, 252 Ill. 490; Sec. 170, Revenue act (Hurd's Stat. 1911, p. 1936).

²⁶⁸ *People v. Cosmopolitan Fire Ins. Co.*, 246 Ill. 448.

²⁶⁹ *Grant Land Ass'n v. People*, 213 Ill. 256, 261 (1904); Sec. 29, Act of 1898 (Hurd's Stat. 1899, p. 1451).

2594 Right of way, railroad track

Lots which are not connected with the railroad track or any side track of a railroad and used for stock pens for live stock preparatory to loading are not a part of the right of way and are properly assessed by the local authorities.²⁷⁰

2595 Right to be heard

An objection that a party has no right to be heard is waived by not moving in the trial court to strike his objections from the files. The objection cannot be raised for the first time in the reviewing court.²⁷¹

2596 Set-off

An alleged overpayment upon one tax cannot be set off upon an application for judgment and order of sale for another tax.²⁷²

2597 Statute; compliance, repeal

In levying municipal taxes, strict compliance with the statutory requirements is essential.²⁷³ The failure to comply with a substantial requirement of the statute vitiates the tax.²⁷⁴ Unless the right to proceed under a repealed tax law is preserved by the repealing statute, no lawful levy can be made under the repealed statute.²⁷⁵

2598 Taxing power, constitutional limitation

Upon an application for judgment and order of sale, a special assessment may be resisted on the ground that the municipality has exceeded its constitutional taxing power, for the reason that this objection cannot be interposed against an application for the confirmation of the assessment.²⁷⁶

2599 Valuation, assessed

The assessed value of the property must be set down by the assessor or board of review in the proper column, unless the

²⁷⁰ *People v. Cairo, V. & C. Ry. Co.*, 247 Ill. 365.

²⁷¹ *People v. Chicago & E. I. R. Co.*, 214 Ill. 192.

²⁷² *People v. Chicago, B. & Q. R. Co.*, 247 Ill. 340, 345 (1910).

²⁷³ *People v. Kankakee & Seneca R. Co.*, 248 Ill. 114, 117 (1911).

²⁷⁴ *People v. Chicago & North-*

western Ry. Co., 249 Ill. 170, 172 (1911).

²⁷⁵ *People v. Toledo, St. Louis & Western R. Co.*, 249 Ill. 175, 178 (1911).

²⁷⁶ *People v. Chicago & Alton R. Co.*, 253 Ill. 194; Sec. 12, art. 9, Const. 1870 (Ill.).

particular property to be assessed is not enumerated in the prescribed classes or columns; in which case it may be assessed as "other property."²⁷⁷

2600 Valuation, board of review

In the years intervening the years for the general assessment the board of review is without authority to increase the assessed value of real estate except in instances where new or added buildings, structures or other improvements of the same kind have been placed upon the real estate after April 1st of the year of the general assessment.²⁷⁸

2601 Valuation, legislative power

The basis of assessment or valuation of property is subject to legislative control and change after a municipality has voted a tax.²⁷⁹ The mere change in rate of a tax as a basis for its extension, which does not reduce the tax actually levied, does not affect the validity of the tax.²⁸⁰

2602 Valuation, over

A fraudulent over-valuation of property by the assessing officer is ground for setting aside an assessment on an application for judgment and order of sale; but mere error in the over-valuation does not invalidate the assessment.²⁸¹

2603 Variance, notice and judgment

A material variance between the notice for judgment and the delinquent list is fatal to a valid judgment and an order of sale. The delinquent list stands as a declaration and the notice as process, and both must agree.²⁸²

2604 Viewing premises

The assessor's or reviewer's failure to go on the land and to actually view it, is but an irregularity which does not defeat the tax.²⁸³

²⁷⁷ *People v. Cosmopolitan Fire Ins. Co.*, *supra*.

²⁷⁸ *People v. St. Louis, Alton & Terre Haute R. Co.*, 230 Ill. 61, 62 (1907).

²⁷⁹ *People v. Chicago & E. I. R. Co.*, 248 Ill. 123; *People v. Cairo, V. & C. Ry. Co.*, 247 Ill. 327, 329 (1910).

²⁸⁰ *People v. Cincinnati, Lafayette & Chicago Ry. Co.*, 247 Ill. 446, 448 (1910).

²⁸¹ *People v. Bourne*, 242 Ill. 61, 63 (1909).

²⁸² *Smythe v. People*, 219 Ill. 76 (1905).

²⁸³ *Grant Land Ass'n v. People*, 213 Ill. 259.

2605 Void and voidable tax, curative act

A voidable tax levy may be rendered valid by an act passed for the purpose of curing any irregularity in the levy, provided the irregularity or the defect does not arise from a lack of authority in the municipality to make the levy, and does not interfere with vested rights.²⁸⁴ A defect in a levy consisting of a failure to specify the purpose for which a tax was levied may be cured by subsequent legislation.²⁸⁵ After the rendition of a judgment of reversal having the effect of invalidating the tax, the legislature is without power to pass an act declaring the tax valid, although the order of reversal does not give specific directions with reference to the character of the judgment that should be entered.²⁸⁶

2606 Vote, lack of

An objection to a tax for want of the vote of the electors present, cannot be urged for the first time on appeal.²⁸⁷

2607 Warrant, necessity

A judgment of sale for an alleged delinquent special tax cannot be entered without the previous issuance and return of a warrant for the collection of such tax as required by statute.²⁸⁸

2608 Warrant, requisites

A warrant for the collection of a tax should not authorize the collector to make the tax out of the goods and chattels of the tax-payer the same as an execution; and so much as the warrant does authorize such a collection, it is void. But the fact that the warrant is defective in the particular mentioned will not destroy its effect as an authority to the collector to make demand.²⁸⁹ A warrant is not invalid or affected by the collector's placing a memorandum upon it for his convenience in keeping track of the parties who are interested in the property,

²⁸⁴ *People v. Wisconsin Central R. Co.*, 219 Ill. 94 (1905).

²⁸⁵ *People v. Wisconsin Central R. Co.*, 219 Ill. 96.

²⁸⁶ *Chicago & E. I. R. Co. v. People*, 219 Ill. 408, 411 (1906).

²⁸⁷ *People v. Chicago & E. I. R. Co.*, 214 Ill. 193.

²⁸⁸ *People v. Record*, 212 Ill. 62, 65 (1904).

²⁸⁹ *Marshall v. People*, 219 Ill. 102.

so that they could be made defendants upon an application for judgment and order of sale.²⁹⁰

2609 Warrant, return

It is not necessary that the return of a county collector shall show to whom the assessment is due or what the assessment is for, as this information is usually set forth in the treasurer's report.²⁹¹

OBJECTIONS, REQUISITES

2610 Several owners, practice

Several land owners may join in objections against an application for judgment and sale for delinquent drainage assessments, where the objections are identical and the joining in the objections will not cause confusion or embarrassment. Various land owners may properly join in an objection that the assessment exceeds benefits.²⁹²

An attorney may represent several owners in their objections to an application for judgment and order of sale and he may have all of the objections conducted as one case.²⁹³

2611 Interest in land, proof

The objector is not required to aver or show his interest in the land for which judgment is sought when the land is taxed in his name.²⁹⁴

2612 Signing

Objections need not be signed by the owners of the property assessed.²⁹⁵

FORMS OF OBJECTIONS

2613 General (Ill.)

State of Illinois,) ss.
..... county.)

In the county court of said county.

To the probate term thereof, 19..

²⁹⁰ Noonan v. People, 221 Ill. 570.

²⁹¹ People v. Prust, 219 Ill. 116, 120 (1905).

²⁹² People v. Welch, 252 Ill. 167, 170, 173 (1911).

²⁹³ People v. Phinney, 231 Ill. 182.

²⁹⁴ Chicago & E. I. R. Co. v. People, 218 Ill. 463, 464 (1905).

²⁹⁵ People v. Phinney, *supra*.

| | | |
|--|---|---|
| The people of the State of Illinois, <i>ex rel.</i> , County collector of..... county, Illinois, v. | } | Application for the sale of land delinquent for taxes and assessments for the year |
|--|---|---|

And now comes the above named defendants and respectfully represent unto this honorable court that they are the owners and lessees, respectively, of a certain railroad tract and right of way, with improvements thereon, in county, in the state of Illinois, running through the various townships, cities and towns, in said county, hereinafter named and being the same property described in the matter of the application of treasurer and *ex officio* tax collector of said county, against these defendants, or either of them, to recover judgment for delinquent taxes against the property described in the said application. And these defendants separately and jointly object to the rendition of any judgment against them, or either of them, or any of their property, or the property of either of them, as prayed for in said application; and these defendants and each of them say that the taxes for which judgment is sought to be obtained in this proceeding are illegal and void, and that the applicant has no right to judgment, for the following reasons:

1. These defendants and each of them, separately and jointly, object to the county taxes of said county of, in the state of Illinois, for the reason that the supervisors' record shows that a levy of dollars, for various county purposes in detail, including the following items (Name them) and each one of these items levies a tax for more than one purpose without designating the amount required for each purpose, and does not comply with section 121 of the Revenue law of the state of Illinois; that the amount of these items is equal to per cent of the total amount levied against these defendants and each of them, the said per cent of dollars levied against 's property for county taxes, to wit, dollars is levied on account of these items, and is invalid, illegal, null and void, and that the county tax of said county of to the extent of dollars against the property of these defendants, and each of them, is illegal, null and void for the reasons above set forth.

2. Road and bridge tax, township. These defendants separately and jointly object to the road and bridge tax of township in said county, for the reason that this tax is extended from a certified copy of the proceedings of the highway commissioners levying per cent on each one hundred dollars, under section 13 of the Road and

Bridge law and per cent under section 14 of said law, with the consent of the board of town auditors and assessor, "in view of the contingency of wash-outs, repairing bridges and grading roads." No particular purpose could be considered a contingency authorizing an additional levy under section 14 except "wash-outs" and no estimate is given of the amount required on that account; therefore, the whole of the additional levy is invalid, illegal, null and void, and the rate extended of one dollar is in excess of the rate allowed by law of cents, excess tax against these defendants, and each of them, to the extent of dollars. The road and bridge tax that the said town of sought to be taxed against the property of these defendants, and each of them, to the extent of dollars, is illegal, null and void and of no effect.²⁹⁶

3. School tax, district number These defendants separately and jointly object to the school tax in district in said county and state, for the reason that the certificate calls for a levy of dollars for school purposes and dollars for building purposes. The equalized value of all taxable property in school district is dollars, and the rate of dollars on each one hundred dollars of this valuation will raise the dollars levy for building purposes, including collection fees. This, added to the two and a half per cent limit for school purposes, makes the total rate authorized dollars, rate extended dollars excess rate, cents, the excess taxes against's property dollars. And therefore the said school tax in and for said district in said county of is illegal and void to the extent of dollars as aforesaid.

4. District road tax, district number township. These defendants object to this tax to the amount of dollars for the reason that they and each of them say that the same has been paid in labor and that they are ready to bring into this court the receipt of the overseer of highways in and for the said district number, in township, in county, Illinois; and they say that said tax should not be extended against the property of these defendants, or either of them, and that no judgment should be rendered against them, or either of them, because said tax has been worked out as is evidenced and will be shown by the receipt ready to be produced in open court by these defendants.

And these defendants and each of them state that they are willing to pay the just taxes to the full amount of a just and legal levy on all of their property; and these defendants pray that these objections and each and every of them above made

²⁹⁶ See Section 2495.

by them be sustained; and that the taxes sought to be recovered from them be, for the reasons above stated, held invalid, illegal and void; and of this they pray judgment, etc.

.....,
Attorney for defendants.

(Michigan)

State of Michigan,

In the circuit court for the county of

In the matter of the petition
of the Auditor General on
behalf of the state of Mich-
igan for the sale of certain
lands returned delinquent
for the non-payment of
taxes, to be heard at
term, 19...

In chancery.

v.

.....
Contestant.

....., a resident of the city of, Michi-
gan, contestant, appearing by, his solicitors, says
that he is the owner of certain lands described in the schedule
attached to said petition, to wit: (Set forth description of land),
and contests the validity of the tax assessed against each of
said lots owned by said respondent and contestant in said
..... plat, and files in writing his objections thereto as
follows:

1. The said sewer tax or assessment, of which this is the
..... instalment, was never authorized by the common
council of the city of in manner as provided by
the charter of the city of

2. The provisions of section, paragraph of the
charter of the city of, relative to the construction
of sewers as amended in 19.. and in force when the special
assessment roll for said sewer was prepared, required that
"the amount to be assessed to any lot, tract or parcel of land
shall be according to the benefits resulting to the same, which
shall be estimated by the engineer and determined by the com-
mon council," were not followed, or complied with, but said
assessment was attempted to be made in accordance with said
section of said charter before amended, which required that
"the amount to be assessed to any lot, tract or parcel of land
shall be according to the benefits resulting to the same, taking
into account the area thereof as may be determined by the
engineer," which was not the law when this assessment roll
was made.

The benefit to each and every lot or parcel of land in the assessment district was not determined by the common council as required by the charter, but, was, if at all, determined by the engineer, who determined the same on an arbitrary, flat rate per square foot, which was illegal, unjust and inequitable, and made the entire assessment void. The determination of the benefit for the purpose of apportioning a tax among the several lots or parcels of land in an assessed district, cannot be based on an arbitrary, flat rate per square foot, independent of the charter and condition of the various parcels of land, and such a determination which considers the area alone is illegal, and, the apportionment of the benefit in this assessment district having been made in this way, the entire assessment is void.

4. No attempt was made to have the benefit estimated by said city engineer, nor in any way considered by him, nor was such benefit in any way determined by the common council, nor did the common council take any action for the purpose of determining such benefit.

5. That the amount assessed to any lot, tract or parcel of land within said sewer district and especially the lots or parcels of this objector above described was and is not according to the benefits resulting to the same by the construction of said sewer.

6. The costs and expenses covered by said assessment roll for the construction of said sewer were not apportioned according to the benefits resulting to said lots, tracts or parcels of land described in said roll, but, on the contrary, said assessment was made without regard to the benefit to each or any lot, tract or parcel of land in the assessment district, taking into consideration only the area thereof, and was at a flat rate per square foot on each and every lot, tract and parcel of land in said district without distinction as to any particular benefit to any such lot, tract or parcel.

7. Instalments of the tax assessed against several descriptions of land within this sewer district for the construction of this sewer have been held by this court as not in proportion to the benefits received, on the ground that the method of determination of the benefit was wrong, being based on an arbitrary, flat foot rate, which determination by this court makes the entire assessment void, as a court cannot determine that an unjust method of determining the benefit will result in an unjust tax as to one parcel and not as to another.

8. Several instalments of this sewer tax assessed against parcels of land within said sewer district having been set aside by this court on the ground that the determination of the benefit as made was excessive and not made on the proper basis, results in the entire assessment being void, as a court having determined that the basis of the determination of the benefit on one parcel was wrong cannot assume the jurisdic-

tion of a council or assessment board and determine whether the amount apportioned to a parcel of land upon a wrong basis would be more or less if apportioned upon a proper basis.

That the matters above set forth are jurisdictional and not mere irregularities, and that said land is not legally liable for the amount assessed against the same for the construction of said sewer.

.....
 Contestant.
 By.....
 Solicitors.

2614 Certificate of completion (Ill.)

(Caption)

In re application of county treasurer and *ex officio* county collector of county, Illinois, for judgment and order of sale for delinquent taxes and unpaid special assessments and instalments thereof, and special taxes made, levied and assessed by the authority of the city of, county, Illinois.

The objections of for the amounts herein-after specified to the special assessment, and to the instalment of special assessment, warrant number, dated the day of, 19.., levied and assessed by authority of the city of, Illinois, in the matter of the improvement of certain parts of streets, together with the alley and street intersections in the city of, county of, and state of Illinois, by draining, grading, curbing and paving of the same and providing for the levying of a special assessment therefor, which remains due and unpaid, with interest, on this and unpaid instalments, at the rate of five per cent per annum from the day of, 19.., to the day of, 19.., and interest on this instalment from the day of, 19.., to the day of, 19..:

| Name | Addition to | Lot | Block | Amount |
|-------|-------------|-----|-------|---------|
| | | ... | | \$..... |
| | | ... | | |

1. Because on the day of, 19.., the board of local improvements of said city of, filed in the office of the clerk of the county court of county, Illinois, a certificate of completion and acceptance of said improvement, in and by which said certificate, said board of local improvements, certified that the said work was done, in all respects, in accordance with the ordinance and the contract. Whereas, that afterwards, to wit, on the day

of, 19.., several objections were filed to the approval of said certificate of acceptance by said county court, in the office of the clerk of said county court, among which were the objections of this objector, who filed the objections hereto attached marked exhibit "A," and made a part hereof.

That afterwards, to wit, on the day of, 19.., a hearing was had upon said objections before the county court of county; and the said county court, to wit, on the day of, 19.., entered the order hereto attached marked exhibit "B," and which is made a part hereof.

That afterwards, to wit, on the day of, 19.., being the contractor who constructed the said improvement, offered a certain bond in the sum of dollars, conditioned for the faithful performance of the uncompleted portions of its contract, which said bond was approved and accepted over the objections of this objector; and thereupon said court entered an order hereto attached marked exhibit "C," which order is made a part hereof.

And this objector contends that the said county court was without jurisdiction to enter the last named order, and to accept and approve the bond for the performance of the uncompleted work of the said contractor, as hereinbefore set forth.

2. Because said, afterwards, that is to say, during the month of, 19.., made a pretense to complete the work adjacent to the property of this objector and other objectors; but this objector states that said contractor did not remove the pavement opposite her property on street, from the alley east to street, and re-pave the same, as was ordered and directed by the said county court, and that said contractor only removed a portion of said pavement and only re-set a portion of said pavement.

3. Because the said contractor, in removing or in tearing up said brick pavement, broke and chipped off large pieces of nearly all of the bricks removed by it, and then re-set the same bricks instead of re-setting new bricks thereon. That said bricks, as so re-set or re-laid by said contractor, have large pieces broken off of the same, so that in many places there is as wide a space as from one and one-half to two inches between the bricks of said pavement, as so re-laid by the said contractor.

4. That the water will not now drain from certain portions of said street opposite the premises of the objector hereinbefore described, any better than it did before said was ordered by said county court to take up and re-lay said bricks.

5. That the so-called asphalt, poured between the interstices of the bricks, as re-laid opposite the property of this objector by the said is not composed of the materials.

nor in the same proportions as is required by the ordinance; but instead of following the requirements of the ordinance in this behalf, the said so-called asphalt is composed of a very cheap and inferior grade of filling, entirely different from that specified in either the contract or the ordinance.

6. That the so-called asphalt used in filling up the interstices in the entire improvement, is not composed of the materials, nor of the proportions thereof, as is provided by the contract.

7. That none of the cast iron crossing plates, extending over and across the gutters at the street crossings, have been re-set as ordered by the court; that nearly all of said crossing plates are warped, and extend in some places more than an inch above the level of the adjacent surface.

8. That the concrete curb constructed by the contractor on the street, on the side of street, and on the side of the private driveway of this objector, is constructed of clay and other inferior material, to such an extent that when the boards used as a casing for said concrete curb, were removed therefrom, about weeks ago, large portions of said concrete curb became disintegrated and fell down. That at the time said certificate of completion was filed in the office of the clerk of said county court, and at the time of the hearing on said certificate of completion, and up to about a month ago, the casing had never been removed, so that none of the board of local improvements, nor anybody else, could have seen whether or not said concrete curb was properly constructed, or whether, in fact, there was anything constructed there.

9. That at no time since the first order of said county court, dated day of, 19.., nor the said second order of said county court, filed, 19.., have the board of local improvements of the city of, or any of them, ever inspected the work for the purpose of ascertaining whether or not the contractor has complied with the orders of the said county court hereinbefore mentioned. Neither has there been filed in the office of the said county clerk, nor in the office of the clerk of said county court, nor at any place else, any certificate of completion since the pretended completion of the work, nor has said county court approved the work in any manner, as the same is now supposed to have been finally completed.

10. This objector has caused diligent search to be made for the bond referred to in the order of the said county court filed, 19.., given to secure the property owners and the said city, for the proper completion of the work in question, and that neither this objector, nor her attorney, have been able to find said bond, nor to locate its whereabouts. That the same has not been filed in the office of the said city

clerk, nor in the office of the said county clerk, nor clerk of said county court.

11. This objector further objects to the payment of the tax returned delinquent herein, for the reason that she believes that she ought not to be compelled to pursue her remedy for the completion of said work in accordance with the terms of the contract and the ordinance, by suit upon the bond, but that before she can be compelled to pay said instalment, the said work should have been completed conformably with the order of the said county court hereinbefore made, the said work then inspected by the board of local improvements, the certificate of completion then issued by said board of local improvements and next thereafter approved by the said county court.

12. This objector further objects to the payment of the first instalment of this assessment for the reason that the said board of local improvements did not file, or cause to be filed, in the office of the clerk of the said county court, being the court in which the assessment herein was confirmed, a certificate signed by the secretary, of the date of the first voucher and of the amount thereof, within thirty days after the issuance thereof. In fact no such certificate has ever been filed with the clerk of said court at any time up to this date.

Wherefore, this objector prays that the application for judgment of the said county treasurer and *ex officio* county collector of the county of and state of Illinois, for judgment and sale of the lots of your objector hereinabove described, may be denied, and that said suit and said application be dismissed.

.....

.....
Attorney for objectors.

Exhibit "A"

(Caption)

1. That said improvement is not constructed upon the grades established in the ordinance.

2. That said improvement, the paving and the curbing, are not constructed upon the lines provided in said ordinance.

3. That the curb is not constructed with the materials, both in proportion and quality, as provided in said ordinance.

4. That the excavations for said improvement were not made to the lines, grades or depths provided in said ordinance.

5. That the foundation course was not constructed with the proportions, quality or thickness provided in said ordinance.

6. That the foundation was not brought to a uniform grade with the materials in proportion or quality or in the manner provided in said ordinance.

7. That the foundation course was not in a proper condition when covered with the sand course, but was full of holes and

not uniform, and that said sand course or cushion varies from two to five inches in thickness.

8. That the brick, gravel and sand, cement or asphaltum filler used in said improvement are not of the kind, character or quality prescribed in said ordinance.

9. That said improvement, or parts thereof, were constructed, concrete made, brick laid and filler placed in freezing weather, contrary to said ordinance and causing said work to be inferior to the provisions of said ordinance.

10. That items of expense are charged in said report which are not proper items in the improvement in question.

11. That items are included in said report for excavation, grading, concrete and other labor and materials which were not done, performed or furnished for said improvement.

12. That costs and expenses are included in said report which are not proper charges against said improvement or the owners of property taxed therefor.

13. The sandstone curbs, where necessary to be re-set and re-aligned, have not, nor has any of them, been re-set upon a concrete foundation four inches deep and six inches wide as provided by paragraph of section of the improvement ordinance herein; but that the same have been re-set upon brick.

14. That in those streets where excavation was necessary as provided by paragraph of section of said ordinance, the same was not excavated to within inches of the sub-grade, and then brought to the true grade with a roller, the weight of which was at least ten tons. And the objector says that especially is this true opposite her property on street and street.

15. The interstices of the bricks, after the same had been laid in the making of said improvement, were not filled with an asphalt filler, as provided by paragraph of section of said ordinance.

16. And the objector especially objects that upon street, immediately contiguous to this objector's property, a sewer had been constructed, running from west to east along the south side of said street for a distance of about feet, said sewer having been constructed a short time before the improvement herein had been constructed. That when the sewer pipe was laid therein and the sewer excavation filled in, the earth was neither tamped nor rolled, with the result that the pavement on the south side of said street, above said sewer, settled down until it was several inches lower than the grade of said pavement. That the civil engineer of the city of and the contractors who constructed the improvement herein, recognized the fact that said improvement had not been properly constructed along the south side of said

..... street at the place above indicated and attempted to rectify the same by taking up the paving brick at said place and attempted to raise the grade of said brick by placing an additional amount of sand under the same at said place, but the improvement, as the same is now constructed, is yet below grade at the place indicated, causing the surface water to fall upon said street and to remain along the south side of said street, immediately contiguous to this objector's property.

17. That along the place mentioned and described in objection 5, above said sewer on said street, several of the bricks have come apart to the extent of one-half of an inch or more, some ends being depressed into the earth, while others are elevated above the surface of the bricks immediately contiguous.

18. That the board of local improvements of said city have not inspected said work as a body, and that neither the president of said Board, nor one of its members, has ever attempted to inspect said work as the same was being done, nor have they inspected it subsequently to the completion thereof; that the acceptance of said improvement by these members was made contrary to the letter and the spirit of the statute; that neither has the civil engineer, who is the other member of said Board, inspected said work from time to time, to the extent that he would know the character of the materials used, or the manner in which the work was constructed, and on that account was unable to report to the other members of the board of local improvements.

19. That the north side of street, from street east for a distance of about feet, or more, the curbing is several inches higher than on the south side of said street, and that also on said street, from for a distance of about feet, or more, east, the paving, as constructed, is considerably higher than the paving as constructed on the south side of said street, which is contrary to the ordinance herein.

20. That the brick used in the pavement of and streets, and in fact in all the streets in which said improvement was made, is not the same as is prescribed by the ordinance herein, but are imperfect in this, that many of the same are cracked, that they are broken and large pieces are chipped and broken off of the same, and that along said and streets in particular, as well as along other streets where said improvement was made, there have been used, contrary to the ordinance, for the purpose of paving said streets, portions of brick which are smaller in size than one-quarter of a brick.

21. That in re-setting the sandstone curbings, many of the same were broken, and pieces chipped off of others.

22. That the paving bricks of said improvement were not laid in straight lines, as provided by the ordinance, but are laid in curved and crooked lines. This was done to such an extent that on certain streets a brick on one end of the line would be as far as a foot and one-half out of line with the brick on the opposite line of paving.

23. That the curbing on the south side of street is not as high as is required by ordinance; while the curbing on the north side of said street is several inches higher than the curbing on the south side of said street.

2615 Drainage assessment (Ill.)

(Caption)

And now comes the owner of the (Insert legal description) county, Illinois and objects to the rendition of judgment and order of sale against said lands, and each and every parcel thereof, for taxes alleged to be due, and unpaid and delinquent against said lands. The said being named in the notice of application for judgment, etc., as

This objector says that the alleged and pretended taxes or assessments for which judgment is asked were assessed and extended or pretended to be assessed and extended against said above described real estate and each and every tract thereof, for drainage purposes in drainage district number, in the towns of and in said county of in the state of Illinois, in which said drainage district said above described lands are located; that said pretended levy or assessment against said lands and each and every tract thereof for drainage purposes was, at the time of such pretended assessment or extension, and is now illegal, null, and void, and of no effect, and is not and has not been at any time since said alleged and pretended assessment was made a lien against said objectors' lands nor any part or tract thereof; and that said alleged and pretended assessment or levy against said lands for drainage purposes as aforesaid is, and was illegal without authority of law and void for the reasons:

1. That no meeting to classify said lands was ever had or held by the drainage commissioners of said drainage district within said district for the purpose of classifying said lands as provided by statute.

2. That no notice of any meeting to hear objections to the classification of said lands to be held within said drainage district was ever given this objector.

3. That the drainage commissioners of said drainage district did not acquire jurisdiction to classify the lands in said district and did not acquire jurisdiction to confirm any alleged

or pretended classification of lands of objector or their lands in said district, and did not, as a matter of law actually classify said lands or confirm said classification; and that the pretended classification of said lands and the confirmation thereof were without authority of law and void.

4. That the alleged and pretended assessment and extension of the drainage tax against the said lands of objector and each and every tract thereof, was illegal and without jurisdiction and void for the reason that the alleged and pretended classification of the said lands by said drainage commissioners was without authority of law and void for the reasons hereinbefore set forth, and further for the reason that no meeting to make or extend said alleged levy or assessment against the lands of objector and other lands in the district was ever held within said drainage district for the purpose of making or extending said pretended assessment against the lands of objector and each and every tract thereof.

Wherefore, objector prays that he be hence dismissed with costs and that no judgment be rendered against his said lands on account of said pretended levy and assessment of said tax nor the extension thereof for the reasons hereinbefore set forth.

.....
Objector.

.....
Attorney for objector.

2616 Drainage assessment before justice of the peace (Ill.)

(Caption in county court)

To the honorable, judge of said court:

The undersigned respectfully represents unto your honor that he is the owner of the following described lands situated in said county, to wit (Describe property); that as county treasurer and *ex officio* collector of said county, has heretofore given notice that he will on, 19.., at the county office building in, Illinois, apply to the county court of said county for judgment against said described property of to the amount of dollars to enforce the payment of said amount claimed to be due for certain drainage assessments purported to have been levied against said land in district No. in the towns of and in said county; and that the said hereby objects to the entry of judgment by the court as prayed for by said county treasurer against said land as aforesaid for the following reasons, to wit:

1. The drainage notice as shown on pages of the drainage record of said district is wholly insufficient to give,

....., the justice, before whom the proceedings were had to make said purported drainage assessment, jurisdiction of said matter inasmuch as said notice did not state when and in what court the petition for such assessment was and is filed as is required by section 3, chapter 42, Hurd's Statutes 1908.

2. Said notice was given by the commissioners of said drainage district when in fact the said justice of the peace should have given it.

3. Said petition was acted on by said justice of the peace on, 19.., without any notice whatever having been given of the filing thereof as is required by said section 3.

4. Said report and order entered by said justice of the peace are void because section 37, chapter 42, Hurd's Statutes 1908, under which said proceedings were had provides that two weeks' previous notice of the time set for the hearing of said petition and report, shall be given as is required by said section 3, chapter 42, but no notice whatever was given of the hearing on said report to the land owners owning lands in said district as is required by said section.

5. Said assessment is void because section 48, chapter 42, Hurd's Statutes 1908, provides that a justice of the peace shall have jurisdiction to a sum not exceeding \$2,000 for work to be done in the districts organized before justices of the peace, and the said report of the said commissioners in said drainage record at pages shows that the work proposed to be done in said district would cost \$., and accordingly said had no jurisdiction whatever to entertain any proceedings for the making of said assessment, and said commissioners were likewise without authority and performed an illegal act by spreading said assessment over the lands of said district.

6. Section 62, chapter 42, Hurd's Statutes 1908, provides for the appointment of three commissioners from each district, and where the district is organized before a justice and the work afterwards proposed to be done exceeds in amount the sum of \$2,000, then said county court should appoint the commissioners; but said commissioners of said drainage district were not appointed by said county court.

7. The notice provided to be given by said section 3, chapter 42, requires it to be addressed "To all persons interested," and said drainage notice shown on pages of said drainage record is not so addressed.

For the foregoing reasons the assessment against the lands of said objector for which judgment is sought to be obtained by said county treasurer is illegal and void, and the court should refuse to enter judgment therefor.

.....
By.....
his attorney.

2617 Estoppel by judgment (Ill.)

(Caption)

Comes and objects to the rendition of judgment and order of sale against the following described lands, to wit: (Insert legal description) in county, Illinois, and for grounds of her objections says:

1. That at the term, 19.., of this court the said, county collector applied for a judgment and order of sale against the lands of this objector lying within the drainage district as aforesaid, viz.: (Insert legal description) in county, for an alleged delinquency consisting in the failure to pay the assessment of said drainage district then alleged to be due; that said county collector applied also for a judgment and order of sale against said lands for the same assessment now sought to be collected by these proceedings; that this objector then appeared and interposed the following objections: (Insert objections); that after due consideration of the above objections, and the hearing of the evidence thereon, the court rendered and caused to be entered the following judgment; which judgment was duly signed: (Insert judgment).

That said judgment is now in full force and effect; that in the proceedings above referred to and set out, this objector attacked the validity of said assessment on the ground that the classification upon which it was based, was invalid; that the court, in sustaining objections numbered above set out, passed upon the question of the validity of said assessment and classification and held the same to be invalid as to the lands of this objector; and that this objector is now attacking the validity of the said assessment and the classification upon which it is based, for the same reasons as were alleged in her above objections.

Wherefore, the petitioner is estopped by the said judgment to petition this court for a judgment of sale against said lands for the alleged delinquency set up in his said petition.

.....
Attorney for said objector.

2618 Sidewalk (Ill.)

(Caption)

Now comes by their attorneys, and enter their appearance and file their objections in the matter of the above application, and say that they are the owners respectively of the several lots, pieces and parcels of land set opposite their respective names in the following list, to wit: (Insert legal description).

That said county treasurer and *ex officio* county collector has included these objectors' above described property in said above application for judgment and has advertised the same as

being delinquent for said special tax warrant of the village of and in said application asks for judgment and order of sale against these objectors' said property, and these objectors hereby object to judgment or order of sale being entered against their said property on said warrant in this proceeding, for the following, among other reasons:

1. That the ordinance does not specify the grade at which said sidewalk is to be laid.

2. That the grade attempted to be established in said ordinance is unreasonable and makes the said ordinance unreasonable, oppressive and void.

3. That the said proposed sidewalk has never been constructed in accordance with the ordinance.

4. That a copy of the ordinance is not attached to the report filed with the county treasurer, as required by statute.

5. That the ordinance passed by the Village Board was never published as required by statute.

6. That the property owners were not allowed days after the publication of the ordinance passed by the Village Board in which to construct said sidewalk.

7. That the said sidewalk has never been completed in accordance with the ordinance.

8. That said ordinance provided for a double improvement.

9. That said ordinance is unreasonable, oppressive and void.

10. That said improvement is not a local improvement and will be of no benefit to the property assessed, but that the same is a public improvement.

11. That said special tax is unreasonable, oppressive and void in that it exceeds the value of the lots assessed; that the street where the sidewalk is ordered laid is unimproved and vacant; that the grade of sidewalk is unreasonable, oppressive and dangerous; that there is a quarter of a mile intervening and also railroad tracks between avenue and avenue, between which points no sidewalk is ordered to be laid.

12. That the lots of these objectors were not delinquent at the time of the report by the clerk to the county treasurer.

13. That said sidewalk was not laid by the village of as provided by statute.

14. That the sidewalk laid under said ordinance was laid by a contractor under a bid made by such contractor and accepted by the Village Board long prior to the passage of the ordinance for said sidewalk.

15. That no bill of costs made as specified in the statute was ever filed with the village clerk.

16. That the several amounts respectively set out in the alleged bill of costs are not correct and are not the amounts

respectively of the actual cost of said sidewalk, but are merely estimates based upon a general contract.

17. That the alleged bill of costs filed in the office of the clerk of said village of does not show in separate items the cost of grading, materials, laying down and supervision of said sidewalk, and is not certified by the parties designated in the ordinance or in accordance with the statute.

18. No special tax list was prepared or filed by the clerk of said village in accordance with the statute.

19. That said sidewalk was not completed in accordance with the ordinance when the alleged bill of costs was filed.

20. No warrant was issued to the collector of said village by the village clerk in accordance with the statute, and no return thereof was made as required by the ordinance and statute.

21. The clerk of said village did not make report of delinquent taxes to the county treasurer as provided by statute, nor did he attach thereto a copy of the ordinance.

22. The ordinance does not define the location of said proposed sidewalk with reasonable certainty and the manner of its construction.

23. Said ordinance was not published as required by law.

24. That the county court has no jurisdiction to enter judgment upon said warrant.

And these objectors, for the objections above set out, and numerous other objections appearing upon the face of said proceeding, hereby object to judgment being entered against their said property upon said warrant, and hereby pray that their objections may be sustained and said application for judgment refused.

.....
By.....
their attorneys.

.....
Attorneys for objectors.

FILING OBJECTIONS

2619 Illinois

Under Illinois practice, the objections must show that they have been filed with the clerk of the county court, if the county clerk has charge of more than one set of records.²⁹⁷

AMENDMENT

2620 Scope

Leave to amend should be given only in cases where there is something to amend.²⁹⁸

²⁹⁷ *People v. Phinney, supra.*

²⁹⁸ Cincinnati, Indianapolis, & West-

ern Ry. Co. v. People, 213 Ill. 558, 561 (1905).

2621 Leave

An amendment to an objection should be allowed without a continuance, if it refers to a matter which works no surprise to the county collector.²⁹⁹

2622 Tax levy

An amendment of a tax levy in matters which are merely formal is permissible whenever there is a valid levy for an authorized purpose.³⁰⁰

2623 Making amendment

Officials who obtain leave to amend proceedings upon which to base a judgment and order of sale must make the amendment, or the judgment will be reversed.³⁰¹

TRIAL

2624 Motion to strike objections, practice

Improper objections filed to an application for judgment and order of sale may be stricken out on motion.³⁰²

2625 Hearing

All objections may properly be joined and heard in the same proceeding, although several taxes are involved, where there is but one application to enforce their payment.³⁰³

2626 Burden of proof

The law presumes that a tax has been legally levied.³⁰⁴ Upon an application for judgment and order of sale for delinquent taxes, whether special or otherwise, the land owner has the burden of pointing out and proving any valid objection which

²⁹⁹ Chicago, Peoria & St. Louis Ry. Co. v. People, 214 Ill. 471, 473 (1905).

³⁰⁰ People v. Toledo, St. Louis & Western R. Co., 242 Ill. 515, 518 (1909); Illinois Central R. Co. v. People, 213 Ill. 177.

³⁰¹ Ottis v. Sullivan, 219 Ill. 365, 368 (1906).

³⁰² People v. Martin, 243 Ill. 284 (1910).

³⁰³ People v. Kankakee & Southwestern R. Co., 237 Ill. 362, 367 (1908).

³⁰⁴ People v. Illinois Central R. Co., 252 Ill. 262, 265 (1911).

does not appear on the face of the delinquent list, notice, or proof of publication; and if he fails to do so, judgment may be entered as prayed.³⁰⁵

2627 Evidence, certificate of publication (Ill.)

(Venue)

I,, being first duly sworn, depose and say that I am the president of the company and that the foregoing lists of lands and lots contained in the newspaper known as to which this certificate is attached is a list of delinquent lands and lots upon which remain due and unpaid the taxes levied and assessed for the year 19.., (and prior years), together with the amounts for which said lands and lots have been previously forfeited to the state of Illinois (when said forfeitures are noted, and which remain due and unpaid on the first day of, 19..), and also a list of delinquent lands and lots upon which remain due and unpaid special assessments and special taxes, levied and assessed by the following corporate authorities: (Name them, as "The village of,") with notices hereto attached, and that the same were duly published and advertised pursuant to law once in a newspaper printed and published in the county of and state of Illinois, and the whole of said advertisement was contained in one edition of said newspaper, and said newspaper being a newspaper of general circulation throughout said county and that the date of the newspaper containing the same was the day of, 19...

In witness whereof I have hereunto set my hand and seal this day of, 19...

.....
President, etc.

(Corporate seal)

Subscribed, etc.³⁰⁶

2628 Evidence; prima facie case, collector, stipulation

Upon application for judgment and order of sale the collector makes out a *prima facie* case by his sworn report of delinquent lands and proof of publication and statutory notice.³⁰⁷ Under a stipulation that the collector has made out a *prima facie* case, it is not necessary for him to show the validity of the tax.³⁰⁸

³⁰⁵ Hurd v. People, 221 Ill. 398, 402 (1906); People v. Hulin, 237 Ill. 122, 124 (1908); People v. Toledo, St. Louis & Western R. Co., 231 Ill. 390, 392 (1907); People v. Chicago, Indianapolis & St. Louis S. L. Ry. Co., 249 Ill. 102, 105 (1911).

³⁰⁶ Approved in Gage v. People, 213 Ill. 410 (1905).

³⁰⁷ People v. Cairo, V. & C. Ry. Co., 249 Ill. 97, 99 (1911).

³⁰⁸ People v. Elgin, J. & E. Ry. Co., 255 Ill. 269, 270 (1912).

2629 Propositions of law

No propositions of law are necessary upon an application for judgment and order of sale.³⁰⁹

2630 Motion for judgment, renewal

An application for judgment in favor of an objector, if made at the close of the relator's case, should be renewed at the close of all of the evidence, or the motion is unavailing on appeal or error.³¹⁰

JUDGMENT

2631 Illegal portion of tax

A judgment may be rendered against property for a portion of the tax levied where the other portion of the levy is illegal, if the illegal portion of the tax is susceptible of separation from the legal.³¹¹ But a judgment for taxes is reversible if any substantial part of it is illegal, regardless of whether or not the illegal is separable from the legal portion of the tax.³¹²

2632 Partial reversal

Upon an application for judgment and order of sale the reversal of the judgment of confirmation as to one owner does not affect the judgment as to all the other owners, the judgment being several as to each.³¹³

2633 Reduction, drainage assessment

On an application for judgment and order of sale for delinquent drainage assessments and objections filed thereto, the court may cut down the tax to an amount which is actually due upon the lands according to the original classification.³¹⁴

³⁰⁹ *People v. Chicago, B. & Q. R. Co.*, 231 Ill. 112 (1907).

³¹⁰ *People v. Chicago, Indianapolis & St. L. S. L. Ry. Co.*, 243 Ill. 221, 223 (1909).

³¹¹ *Cincinnati, Indianapolis & Western Ry. Co. v. People*, 212 Ill. 518, 529 (1904).

³¹² *People v. Cairo, V. & C. Ry.*

Co., 249 Ill. 53, 55 (1911); *People v. Chicago & Northwestern Ry. Co.*, 249 Ill. 170, 173 (1911); *People v. Cairo, V. & C. Ry. Co.*, 249 Ill. 97, 101 (1911).

³¹³ *Harman v. People*, 214 Ill. 454, 457 (1905).

³¹⁴ *People v. Green*, 242 Ill. 455, 460 (1909).

2634 Several judgments unauthorized

But one judgment can be entered against a lot for one tax, upon an application for a delinquent special assessment.³¹⁵

REQUISITES

2635 Sufficiency

A judgment order of sale for a delinquent special assessment is sufficient if it recites that judgment be entered against the tracts or lots of land, or parts of tracts or lots, as the case may be, as described in the objections filed and set forth in the attached schedule, which is made a part of the order, for the sum annexed to the description of each lot, being the amount due, etc.³¹⁶ The omission from the judgment of a material fact renders the judgment invalid, although such fact is contained in the schedule which is attached to the judgment.³¹⁷ Thus, the omission of a dollar mark in front of numerals in the schedule attached to a judgment and order of sale invalidates the judgment.³¹⁸ The entry of a mere order of sale does not satisfy the Revenue act.³¹⁹ But a judgment in substantial compliance with the statute is sufficient.³²⁰

2636 Jurisdictional clause

No jurisdictional clause is necessary where the objectors personally appear in court.³²¹

2637 Amount, certainty

A judgment is fatally defective if the amount or amounts that are adjudged against the property cannot be ascertained from it.³²²

2638 Interest

Interest as penalty cannot be included in a judgment and order of sale of real estate which was listed for taxation during

³¹⁵ Dickey v. People, 213 Ill. 51, 52 (1904).

³¹⁶ Gage v. People, 225 Ill. 144, 147 (1907); Sec. 191, Revenue act (Hurd's Stat. 1911, p. 1940).

³¹⁷ People v. Smythe, 232 Ill. 242, 247 (1908).

³¹⁸ Gage v. People, 219 Ill. 20, 21 (1905).

³¹⁹ McChesney v. People, 174 Ill. 46, 51 (1898).

³²⁰ Gage v. People, 219 Ill. 369, 371 (1906).

³²¹ Gage v. People, 213 Ill. 468, 472 (1905).

³²² Gage v. People, 213 Ill. 410, 413 (1905); Gage v. People, 213 Ill. 472.

all prior years and all taxes on which were assessed, extended and paid, and which is not property purposely omitted in the assessment or defectively described or assessed.³²³

2639 Costs, printer's fees

A personal judgment for costs cannot be entered upon an application for judgment and order of sale.³²⁴ Including in a judgment and order of sale for delinquent special assessments an item for printer's fees is surplusage and does not vitiate the judgment.³²⁵

2640 Signature

A judgment and order of sale for a delinquent special assessment must be signed, and not merely initialed by the county judge.³²⁶ The judgment is invalid if it is not signed by the trial judge at the term the judgment is rendered.³²⁷

FORMS

2641 Advisement, taking under (Ill.)

(Caption)

Upon the objections of and to the county taxes \$.; the road and bridge tax in township \$.; the school tax in district number \$.; the district road tax in district number, in township \$.; evidence was heard by the court, and not being well informed in the premises, the said objections are, by the court, taken under advisement. And all other objections not herein specifically enumerated are, by the court, overruled.

.....
Judge.

2642 Ordering sale (Mich.)

(Caption)

In the matter of the petition of auditor general of the state of Michigan, for and in behalf of said state, for the sale of certain lands for taxes assessed thereon.

³²³ *People v. Ellis*, 253 Ill. 369, 373 (1912); *Hayward v. People*, 156 Ill. 84, 86 (1895); Sec. 276, Revenue act (Ill.).

³²⁴ *People v. Ellis*, *supra*.

³²⁵ *Gage v. People*, 225 Ill. 144, 148 (1907).

³²⁶ *Gage v. People*, 219 Ill. 20, 22 (1905); *Dickey v. People*, 213 Ill. 52.

³²⁷ *Waite v. People*, 228 Ill. 173, 177 (1907).

The said petition and the matters therein stated, and the objections filed to certain taxes therein claimed (if any such objections are filed) to No. by, came on to be heard and proof of the due publication of the order of hearing and of said petition having been made and filed, and after hearing all parties interested therein, it is ordered, adjudged and decreed that the amount of taxes, interest, collection fee, and charges set down in the column headed "Amount decreed against lands," in the tax records of which said petition forms a part, are valid, and decree is made in favor of the state of Michigan therefor against each parcel of said land for the amount set down in said column opposite to such parcel. It is further ordered, adjudged and decreed that said several parcels of land, or such interest therein as may be necessary to satisfy the amount herein decreed against the same, shall be severally sold as the law directs, on the day of, 19.., beginning at ten o'clock A. M. on said day, or on the day or days subsequent thereto as may be necessary to complete the sale of said lands and of each and every parcel thereof, at the office of the county treasurer, or at such convenient place as shall be selected by him at the county seat of the county of, state of Michigan. It is further adjudged and decreed that the several special orders made by this court, and entered on said tax record, are made a part hereof, with the same effect as if entered herein.

.....
Circuit Judge.

2643 Overruling objections (Ill.)

(Caption)

And now, to wit, on this the day of, 19.., the same being one of the days of the term,, 19.., of this court, again comes the said county treasurer and *ex officio* collector of the revenue of county, by his attorney, and moves the court for judgment herein.

And it appearing to the court, that due notice has been given of the intended application for a judgment against said lands and lots, and no sufficient defense having been made or cause shown why judgment should not be entered against said lands and lots, for the amount of said special tax, printer's fees,³²⁸ and costs, due and unpaid thereon; that is to say, the special tax No., warrant No., levied and assessed by authority of the village of, in said county, and printer's fees, and costs due thereon.

Therefore, it is ordered by the court, that judgment be and is hereby entered against the aforesaid tracts or lots of land, or parts of tracts or lots, as the case may be, in favor of the people of the state of Illinois, for the sum annexed to the

³²⁸ See Section 2639.

description of each, being the amount of the said special tax, printer's fees, and costs, due and unpaid severally thereon, except as to lots and lands opposite to which in the margin of said list the words "Judgment refused," or "Application withdrawn" are written, as to which lots and lands judgment is hereby refused.

And it is ordered by the court that the said several tracts or lots of land, be sold as the law directs, to satisfy the amount of the said special tax, printer's fees, and costs annexed to them severally.

.....
Judge of the county of, Illinois.

2644 Sustaining objections (Ill.)

(Caption)

This day comes on for hearing the matter of objections of, objecting to the rendition of judgment and order of sale of land set out in said objections, and the court having heard said objections, the testimony of witnesses and the argument of counsel, and being now fully advised in the premises doth sustain said objections of and doth deny the application of said county collector for judgment and order of sale as to said land of, set out in said objections for taxes for; to which judgment of the court the county collector then and there excepted. And now comes said, county collector by his attorney and prays an appeal from said order of the court to the supreme court of the state of Illinois, which said appeal is allowed by the court and bill of exceptions ordered filed within days from this day of, 19...

.....
County Judge.

2645 Sustaining and overruling objections (Ill.)

(Caption)

And now on this day of, 19..., came the, in the matter of their objections filed herein and also came the people of the state of Illinois *ex rel.* the county collector, and this cause having been heretofore heard by the court and taken under advisement and the court now being well advised in the premises, upon due consideration thereof sustains the objections filed herein to the district road tax in district number, in township, dollars, said district road tax having been paid; and also to the road and bridge tax in township; to which ruling and judgment of the court, in sustaining the said objection to said road and bridge tax the people of the state of Illinois *ex rel.* county collector except and pray an appeal

to the supreme court of the state of Illinois; which appeal is allowed without bond, and a bill of exception is to be filed within days from this date.

The court overrules the objections filed herein by objectors to the county taxes \$.; the school taxes in the district number \$., and enters judgment against the real estate of said objectors for the taxes so overruled; to which ruling and judgment of the court the said objectors except and pray an appeal to the supreme court of the state of Illinois, which appeal is allowed by the court, upon the said objectors filing bond in the penal sum of dollars within days to be approved by the court, and a bill of exceptions to be filed within days from this date.

.....
County Judge.

2646 Upon remandment (Ill.)

(Caption)

This cause coming on to be heard upon the motion of the attorney for county treasurer and *ex officio* county collector, and the city of, and it appearing to the court that the mandate and transcript of the order of the supreme court of Illinois, reversing the judgment of the court heretofore entered herein as to the property of the objector represented herein by attorneys, and remanding said cause as to the property of said objector, has been filed herein for more than ten days last past, and that due notice has been given that a motion would be made by said petitioner to re-docket said cause and for further proceedings in conformity with the opinion of the said supreme court; therefore, the said cause as to the property of objector, represented by the said property with the amounts of the said special assessment and costs being set out in the attached schedule, made a part of this order, be and the same is hereby re-docketed upon the dockets of this court.

And the said cause coming on to be further heard upon motion of the attorney for the said county treasurer, and *ex officio* county collector and the city of to enter judgment herein in accordance with the mandate and opinion of the supreme court of the state of Illinois; thereupon, the court being fully advised in the premises, it is ordered by the court that judgment be and is hereby entered against the aforesaid tracts or lots of land or parts of tracts or lots, as the case may be, in favor of the people of the state of Illinois for the sum annexed to the description of each, being the amount of the said special assessment, printers' fees and costs, due and unpaid severally thereon. And it is ordered by the court that said several tracts or lots of land be sold as the law

directs to satisfy the amount of the said special assessment, printers' fees and costs annexed to them severally.

Enter.

.....³²⁹
County Judge.

APPEAL AND ERROR

2647 Jurisdiction

The supreme court has jurisdiction by direct appeal or writ of error in the matter of an application for judgment and order of sale.³³⁰

2648 Affidavit upon writ of error

An application for a writ of error in a delinquent special assessment proceeding must be accompanied by an affidavit of the plaintiff in error or his agent, setting forth the time when the warrant was returned or certified delinquent and the failure to receive notice of the pendency of the confirmation proceeding until less than ten days before the entry of the default.³³¹

2649 Deposit of amount of judgment, waiver

The requirement that the amount of the tax for which judgment has been rendered shall first be deposited with the county collector before an appeal shall be perfected, may be waived by the failure to move for a dismissal of the appeal and the submission of the case upon its merits.³³²

2650 Bill of exceptions, necessity

An objection and exception to an order sustaining objections to an application for judgment and order of sale must be preserved by a bill of exceptions.³³³

2651 Assignment of errors, form (Ill.)

(Caption in supreme court)

And now comes the appellant by its attorney and assigns the following errors upon the record of the county court:

³²⁹ Approved in *Gage v. People*, 219 Ill. 369.

³³⁰ Sec. 192, c. 120, Hurd's Stat. 1911, p. 1940.

³³¹ *Stone v. Chicago*, 218 Ill. 348, 349; Sec. 96, c. 24, Revised Statutes (Ill.).

³³² *People v. Chicago, B. & Q. R. Co.*, 253 Ill. 100, 104 (1912).

³³³ *People v. Chicago, B. & Q. R. Co.*, 231 Ill. 113.

1. The county court erred in not sustaining the objections of objector to the county tax levy.

2. The county court erred in not sustaining the objections of objector to the school district tax number

3. The county court erred in overruling the objections of objector and each and every of them.

4. The county court erred in denying the motion of objectors for a judgment at the close of the evidence of the relator.

5. The county court erred in entering judgment against the objector upon the county tax levy.

6. The county court erred in entering judgment against the objector upon the school tax, district number levy.

7. The county court had no jurisdiction to enter judgment against the objector upon the county tax or upon the school tax, district number levy.

.....

Attorney for appellant.

CHAPTER XXXVIII

ARBITRATION

| | |
|-------------------------------------|--|
| §§ | §§ |
| 2652 Bond | 2660 Notice of motion to show cause, etc. |
| 2653 Submission, general | 2661 Order making submission rule of court |
| 2654 Submission, insurance | 2662 Order overruling motion to set aside, etc. |
| 2655 Arbitrators' oath, certificate | 2663 Construction, intendments |
| 2656 Arbitrators' oath, insurance | 2664 Construction; conditions, possible and impossible |
| 2657 Award, general | |
| 2658 Award, insurance | |
| 2659 Demand | |

2652 Bond ¹

Know all men by these presents, that I,, of the county of and state of Illinois, am held and firmly bound unto of the same county and state in the penal sum of dollars lawful money of the United States for the payment of which well and truly to be made, I bind myself, my heirs, executors or administrators jointly and severally, firmly by these presents. Signed with my hand and sealed with my seal and dated this day of, 19...

The condition of the above obligation is such that whereas if the above bounden, his heirs, executors or administrators on his or their parts and behalf do and shall well and truly stand to and perform and abide by, observe, fulfil and keep the award, order arbitrament and final determination of, of the said county and state arbitrators indifferently named and chosen as well for and on the part and behalf of the above named A as the above named M to arbitrate, award, order, adjudge and determine of and concerning all and all manner of action and actions cause and causes of action, suits, bills, bonds, specialties, covenants, contracts, promises, judgments, executions, accounts, debts, quarrels, controversies, damages, trespasses and demands whatsoever, both in law and equity, or otherwise, which at any time or times heretofore have been had, made, moved, brought, commenced, sued and prosecuted, committed, done,

¹ Each party to the arbitration executes a bond to the other party.

suffered or depending and unsettled by or between the said parties so that the said award be made in writing under the hands and seals of said arbitrators or any two of them and ready to be delivered to the said parties in difference or such of them as shall desire the same on or before the, 19..; and the said A does desire that this submission be made a rule of the court in and for the county of and state of Illinois, then this obligation to be void; else to remain in full force and virtue, or in the event of their disagreement then to the decision of the third person they, said arbitrators, may call in as an umpire.

. (Seal)

2653 Submission, general

Whereas divers disputes and controversies have arisen and are now depending and unsettled between and of the county of and state of

Now for the ending and deciding thereof it is hereby finally agreed by and between the said parties that all matters in difference between them shall be referred and submitted to the arbitrament and determination of and also of the same county and state, or in the event of their disagreement they shall have the privilege of calling in an umpire or third person the two said arbitrators chosen in manner and form aforesaid so that the said arbitrators do make and publish their award in writing under their hands and seals ready to be delivered to the said parties or such of them as shall desire the same on or before the And it is further agreed by and between the said parties that their submission to arbitration shall be made a rule of the court in and for the county of and state of

In testimony whereof the parties of these presents have hereunto set their hands and affixed their seals this day of, 19...

(Signatures and seals)

2654 Submission, insurance

It is hereby agreed that, of the first part, and the, of, and such other, etc., as sign this agreement, parties of the second part, that shall appraise and estimate in detail, at the true cash value, the loss and damage by fire to the property as specified below, which appraisalment and estimate in detail by them, in writing, as to the amount of such loss or damage, shall be binding on both parties, except that the by subscribing, does not waive any of its rights or defenses.

It is understood that this agreement is without reference to any other question or matters of difference, if any, within the terms and conditions of the insurance contract, and that it is of binding effect only so far as regards the actual cash value or damage to the property herein described and insured under policy number of the

The property on which loss and damage is to be estimated and appraised in detail is the story frame building occupied as a and dwelling situate on lot (Describe property).

The appraisers are to take into consideration the age and condition of said premises before the fire and also the value of walls, materials or any portion of said building saved, and after making an estimate of the cost of replacing said building, a proper reduction shall be made by them for the difference if any between the value of a new or replaced building and the one insured.

Witness, etc.

2655 Arbitrators' oath, certificate

State of } ss.
 county. }

Personally appeared before the undersigned justice of the peace for said county and and each of them made oath in due form of law faithfully and fairly to hear and examine the matter of difference between and which is submitted to their arbitrament and final determination with privilege to call in an umpire and to make a true award thereof.

Given under my hand this, 19...

.....

2656 Arbitrators' oath, insurance

State of } ss.
 county. }

We, the undersigned, do solemnly swear, that we will act with strict impartiality in making an appraisalment and estimate in detail of the actual loss and damage by fire to the property of, insured by the,, and other companies, which have signed the preceding agreement, and agreeable to the foregoing appointment, and that we will return to the said companies a true, just and conscientious appraisalment and estimate in detail of the loss and damage on the same, according to the best of our knowledge, skill and judgments; and that we are not directly or indirectly interested in the loss as creditors or otherwise; nor related to the assured or sufferers by the fire.

Witness, etc. (appraisers).

Sworn, etc.

2657 Award, general

To all whom these presents shall come, greeting:

Know ye that whereas there are several accounts depending and divers controversies have arisen between A of the county of and state of and M of the same county; and whereas for the putting an end to the said difficulties they, the said M and A by their several bonds of equal date, that is to say, the day of last past have, reciprocally become bound each to the other in the penal sum of dollars to stand by, abide and keep the award order and final determination of L and R of said county of and in case of their disagreement, of a third person to be called in by them as umpire between the said L and R touching the premises, said award be made in writing under their hands and seals and ready to be delivered to the parties in difference on or before the day of, thence next ensuing the date of said bond, as by the said bonds and conditions hereof will appear; and whereas the said L and R arbitrators as aforesaid having pursuant to the said arbitrament bound by mutual consent elected and called upon D of the said county of as their umpire in case of their disagreement touching the matter submitted to them as aforesaid and taking upon themselves the burden of said arbitration and first duly sworn faithfully and fairly to hear and examine the matters of difference between the said parties and to make a true and just award thereon according to the best of their skill and understanding, and having fully examined and duly considered the proofs and allegations of both the said parties, who were duly notified of the time and place at which the said award would be made and the things submitted to them to be settled and finally thereby adjudged, and they the said L and R being unable to agree touching the matters in controversy between the said A and M, know ye, therefore, that, I the said indifferently chosen by the said L and R, as umpire as aforesaid, first duly sworn to decide faithfully and impartially in the premises and having heard and understood the allegations and proofs of both the said parties and being desirous to set the parties at unity and good understanding, do by these presents arbitrate, render and decree as follows:

1. I do award that all actions, suits, quarrels and controversies, whatsoever, which had moved, arisen and depended between the said parties in law or equity for any manner of cause whatever touching the said premises to the day of the date hereof shall cease, and be no further prosecuted and each of the parties shall pay or bear his own costs by them incurred in and about this arbitration and award.

2. I do further award, order and decree, that the contract in relation to the saw mill in the arbitration bonds between the said A and M referred to and mentioned be canceled and be hereafter null and void to all intents and purposes whatever and that the parties stand as they were (with the exception hereinafter mentioned), in the same situation they were before the contract was entered into and that the liability of either party on the article of agreement or sale bill, the agreement or sale bill being the same instrument referred to as constituting the contract of purchase of said mill above mentioned, shall hereafter cease and determine from the day and date hereof forever, the said A to be at liberty to take away the boiler, mill, stones, frame, and apparatus to the same belonging, now put up and standing in said saw mill, whenever he thinks proper so to do, as also such articles of personal property belonging to himself as are in and about said mill.

3. All sums of money paid or payments made by said A to the said M on account of said mill shall stand good to the said M, and that all debts still due and unpaid to the said M by the said A, and all orders accepted by said A in favor of said M or for his benefit on account of said mill, and particularly a certain judgment recovered by one before, Esq., for the sum of dollars, more or less, against the said A as debtor of said M on a garnishee shall be paid, taken up, liquidated and canceled by the said M within days from the date hereof, the said A to have, use, occupy and possess his town lots and real estate by him contracted to be conveyed to the said M in consideration of his purchase of the said saw mill free from all claim or incumbrance on the part of said M.

4. That the said M shall on or before the day of next pay the said A the sum of dollars and on or before the day of next, the further sum of dollars, making in all the sum of dollars, for his damages sustained in the premises and work and labor done on said mill, he, the said M, to give the said A good and sufficient security for the payment of said damages, as well as the sums of money, debts, orders and judgments according to the requisition of the third specification of this award, and in the event of said M failing to do so said A to have a lien upon said saw mill and engine until he comply with this award.

And, lastly, the parties, that is to say, the said A, on the payment or securing by said M of the said sum of dollars damages as above mentioned, as well as the other sums of money orders, debts, and judgment, thirdly above specified, to execute to each other general releases which shall take effect upon the day of instant.

In testimony whereof I have hereunto set my hand and affixed my seal this day of, 19..

..... [Seal]
 [Seal]
 Arbitrators.
 [Seal]
 Umpire.²

2658 Award, insurance

To the, of, and other companies in interest:

Having carefully and accurately estimated and appraised the damage in detail by fire to the property of agreeably to the foregoing appointment, we hereby report that after having taken into consideration the age and condition of the premises previous to the fire, and making proper deductions for the walls, materials and portions of the building saved, also making deductions for depreciation, and other causes, we have appraised and determined in detail the damage to be dollars as per detailed statement attached hereto and made a part hereof.

Witness, etc. (appraisers)

2659 Demand

Mr.

You will please pay over to the bearer the amount, a judgment in favor of on the docket of, Esq., against you and amounting with interest and costs to the sum of dollars, also the sum of dollars on the day of, 19.., due me by you, also the further sum of dollars due me by you on the day of, 19.., which said judgments, sums of money and debts are due me under and by virtue of an award made by, umpire, chosen by R and L, arbitrators, between you and me on the day of, 19.., a copy of which award was delivered to you and which you have in your possession.

You are further notified not to interfere with or in anywise use, wear or put into motion the steam mill and engine and apparatus to the same belonging mentioned in said award, unless you forthwith comply with said award as above demanded; and if you do not comply with said award on receipt

² Great care must be taken that the award is justified by the submission. The foregoing award by the umpire alone was considered valid principally because the sub-

mission required the umpire alone to act in case the other arbitrators failed to agree, and because there was such a disagreement. McDonald v. Arnout, 14 Ill. 58 (1852).

of this notice you are also hereby notified that I shall at the next court to be holden in for county, on the day of, 19.., next, on the day of the term or as soon as counsel can be thereafter heard move said court, for judgment against you for the amount of the judgment, sums of money and debts above mentioned according to the terms of said award.

Witness my hand, etc.

A.³

2660 Notice of motion to show cause, etc.

.....

Sir:

As you have had a copy of the award made on the day of, 19.., by, umpire, chosen and agreed upon by L and R of the county of and state of Illinois, arbitrators, indifferently chosen by us to arbitrate and finally determine all disputes and controversies existing between us prior to the day of past, by our submission to that effect in writing, and our several bonds of arbitration to each other dated the day of, 19.., they, the said L and R, being unable to agree touching the matters therein submitted to them and having thereupon called upon the said, who was indifferently chosen as umpire by the said L and R to decide between them in the premises, who did thereupon make an award of which you have had a copy delivered to you as aforesaid, you are thereupon hereby notified to appear on the first day of the next term of the court to be holden in and for the said county of, at the court house in on the in the of next, and show cause, if any you can, why judgment should not then and there be entered by the said court against you on the said award agreeably to the tenor and effect thereof.

Dated, etc.

A.

Return

Served this notice on R by delivering to him a true copy of the within this day of, 19..

.....

Sheriff.

³ The foregoing notice should be served by the sheriff or his deputy.

2661 Order making submission rule of court

(Caption)

This day come the parties by their attorneys and on the filing of arbitration bonds, award and notice, A by his counsel moves the court that the submission of the parties be made a rule of court and for judgment on the award; which being by the court sufficiently understood, it is ordered and adjudged that the submission and award be and is hereby made a rule of court and performed according to award, and this case is continued until the next term of the court.

2662 Order overruling motion to set aside, etc.

(Caption)

And now on this day come the parties by their attorneys, and it appearing to the satisfaction of the court that at the term,, 19.., of this court judgment was rendered in this cause to make the submission and award of the arbitrators a rule of court, and which said judgment was so rendered upon the filing of arbitration bonds and award with notice, etc., and the defendant having at this term of the court made his motion on affidavit to set aside the award of the arbitrators herein; whereupon, the plaintiff introduced and read counter affidavits touching the statements in said defendant's affidavits; thereupon the motion of the defendant to set aside the award herein was by the court overruled. Therefore it is considered by the court that the plaintiff recover against the defendant the sum of dollars, which is the aggregate of the several sums of money in said award mentioned and that the said defendant do and perform the award of the said arbitrators herein, and which said award is in the words and figures following, to wit: (Set out award).

2663 Construction, intendments

Every reasonable intendment will be allowed to sustain an award.⁴

2664 Construction; conditions, possible and impossible

As between two things that an award directs to be done in the alternative, one which is certain and possible and the other which is uncertain and impossible, the one which is certain and possible must be performed.⁵

⁴ McDonald v. Arnout, 14 Ill. 61.⁵ McDonald v. Arnout, 14 Ill. 62.

CHAPTER XXXIX

ARREST FOR DEBT AND RELEASE

| ARREST | TRIAL |
|--|-----------------------|
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| 2666 Citation | |
| RELEASE | VERDICT |
| 2667 Proceeding, nature | 2677 Guilty |
| 2668 Discharge | 2678 Not guilty |
| 2669 Petition | |
| 2670 Schedule | JUDGMENT |
| 2671 Debtor's schedule and claim of exemption | 2679 Releasing debtor |
| 2672 Notice | |
| 2673 Bail or appearance bond | APPEAL |
| 2674 Order of release | 2680 Jurisdiction |
| DEFENSES | 2681 Bond, debtor's |
| 2675 Plea denying malice | 2682 Bond, creditors' |

ARREST

2665 Affidavit

(Venue)

..... of lawful age, after being duly sworn according to law, states on oath that he is the attorney of the plaintiff the in a certain suit at law wherein said company were the plaintiffs and was the defendant and that said plaintiffs recovered a judgment on the day of, 19.., in their favor against said for the sum of dollars and costs of said suit in the court of county, Illinois, upon which judgment an execution was duly issued out of the clerk's office of said court on the day of, 19.., in due form of law and placed in the hands of the sheriff of county aforesaid to collect, and that said sheriff having the said execution in the hands to collect applied to said the defendant for payment thereof but said neglected and unjustly refused to pay the same, and thereupon said sheriff made a demand of said to surrender of his estate, goods and chattels lands and tenements for the satisfaction of said execution and costs, and particularly that he surrender upon execution all bonds, notes,

deeds of trust, mortgages and government or United States bonds held and owned by him, or any amount thereof sufficient to pay and satisfy said execution and costs aforesaid, but said then and there unjustly and wilfully refused and neglected to turn out or surrender any property, bonds, mortgages, notes, deeds of trust or choses in action in payment or satisfaction of said execution, and the sheriff thereupon returned said execution to wit:

"I did, on the day of, 19.., demand of the within named defendant, that he pay this execution, or that he surrender sufficient of his estate, goods, chattels, lands and tenements for the satisfaction of this writ, and I also informed him that if he failed to comply with said demand, he would be liable to arrest upon an execution against his body, and he having failed to satisfy this writ, or any part thereof, and not being able to find any property in my county on which to levy this writ, I therefore return the same, no property found and no part satisfied this day of, 19...

.....
By.....
Deputy."

And this affiant states on oath that he verily believes said has estate, goods and chattels not exempt from execution, which he fraudulently and unjustly refuses to surrender in satisfaction of said execution, and since the cause of action accrued in this cause that said has fraudulently concealed or otherwise disposed of some part of his estate with a design to defraud his creditors; and said affiant upon his information and belief, states that said is a man of considerable means; that he is the owner of some dollars worth of government or United States bonds; that this affiant learned when in conversation with said that he had invested in said bonds because they were free from taxation; that said debtor was sworn in court as a witness, at the last term of the court, in this county and on oath stated that he then had said bonds and said he had disposed of all his other property to his children, and had nothing taxable, and that his means were all in government bonds. Therefore this affiant states that said debtor is a man of abundant means and able to pay said execution if he was disposed to; that he is possessed of property, to wit, government bonds and other securities which he can surrender in payment of said execution; and that he wilfully withholds and refuses to surrender the same. Wherefore, this affiant prays that an execution against said debtor's body may issue in pursuance to law; and further affiant saith not.

.....
Subscribed, etc.

2666 Citation (Ill.)

State of Illinois, }
 county. }ss.

The people of the state of Illinois, to the sheriff of said county, greeting:

Whereas, has made application to our county court of county to compel the appearance in person of, debtor, before said court, to answer under oath such matters as may then and there be inquired of ..h..., and that said, debtor, may then and there be fully examined under oath, as to the amount and situation of ..h... estate and the names of the creditors and amounts due to each, with their places of residence, and as to such other matters and things as shall then and there be required of ..h... according to law.

We do, therefore, command you to cite the said, debtor as aforesaid, to be and appear before our county court of county at the court house in the city of, in said county, on the day of, 19.., at o'clock .. M., then and there to true answers make to such questions as shall be put to ..h... in the premises, and to abide the further order of said court in that behalf.

And hereof make due service and return as the law directs. Witness, etc. (clerk).

RELEASE**2667 Proceeding, nature**

An application for an insolvent debtor's discharge is a proceeding at law, but is not a suit at law, nor a statutory proceeding.¹

2668 Discharge

A debtor is entitled to a discharge upon compliance with the Insolvent Debtors act when malice is not of the gist of the action which was in fact brought against him as shown by the record in the original suit and excluding all other proof.² To prevent a discharge from arrest or imprisonment there must be a wrong and an intention to commit the injury complained of.³

¹ Groszglass v. Von Bergen, 220 Ill. 340, 343 (1906).

² Kellar v. Norton, 228 Ill. 356, 359 (1907).

³ First National Bank v. Burkett, 101 Ill. 391 (1882); Jernberg v. Mix, 199 Ill. 254 (1902); Kellar v. Norton, *supra*.

2669 Petition (Ill.)

(Caption in county court)

To the honorable, judge of said court.

The petition of to be discharged from imprisonment under the Insolvent Debtors act.

This petitioner,, respectfully represents unto your honor:

That he is a resident of the city of, county of, and state of Illinois.

That he has been arrested under a certain *capias ad satisfaciendum* issued out of the court of in the state aforesaid in favor of the plaintiffs in a certain suit of against this petitioner, being cause general number of said court of county.

That this petitioner is now in the custody of the sheriff of said county under and by virtue of the writ aforesaid and that he is desirous of releasing his body from such arrest or imprisonment, by delivering up his property.

And this petitioner avers that malice was not the gist of the action in the court hereinbefore referred to.

Wherefore, this petitioner prays that such steps and proceedings may be had in this honorable court as are prescribed by law relating to insolvent debtors; that he may be adjudged an insolvent debtor within the purview of said Insolvent Debtors act; and that he may be discharged and released from the custody of the said sheriff of county.

And this petitioner will ever pray.

.....,
Petitioner.

.....,
Attorneys for petitioner.

County court of
county

In the matter of

Arrested at the suit of

Petition for release

Filed, etc.

2670 Schedule "a" (Ill.)

Of, an insolvent debtor, showing all his real and personal estate, including money, notes, bonds, bills, obligations and contracts for money or property of any and every description or kind, name or nature whatsoever, together with a true and perfect account of all debts, dues and demands of every nature, owing by him to other persons at the present time.

....., 19..

Description of property:

.....

.....

Value, \$.....

"b."

Of the liabilities of, an insolvent debtor.

To whom owing

Amount

.....

.....

I do solemnly swear that this schedule now delivered and by me subscribed, contains, to the best of my knowledge and belief, a full, true and perfect account of all the estate, lands, tenements, hereditaments, goods, chattels and effects unto me in anywise belonging, and such debts as are unto me owing, or to any person for me, or in trust for me, all securities, contracts whereby any income may become due or payable, or any advantage or benefit accrue to me, or to my use, or to any person or persons for me, or in trust for me; that I have not lands, money or any other estate, real or personal, in possession, reversion or remainder, which is not set forth in the schedule; nor have I, at any day or time, directly or indirectly, sold, lessened in value, or otherwise disposed of all or any part of my lands, money, stocks, debts, securities, contracts or estate, whereby to secure the same, or to receive or expect to receive any profits or advantage therefrom, to defraud any creditor or creditors to whom I am indebted in anywise whatsoever; and also that this schedule contains a true and perfect account of all the debts which I owe to any person or persons whatsoever.

.....

Sworn to and subscribed before me,, judge of the county court of county, this day of , 19..

..... Judge.

2671 Debtor's schedule and claim of exemption (Ill.)

State of Illinois, } ss.
 county. }

Schedule of personal property of every kind belonging to, a debtor against whom an has been issued out of the court of county, and who desires to availself of the benefit of an act entitled "An Act to exempt certain personal property from attachment and sale on execution, and from distress for rent," approved May 24, 1877, together with an appraisalment of said property, as made by, three householders, therefor duly summoned and sworn.

Description of property of every kind and character, including money on hand and debts due and owing to said debtor

| | | Value | |
|-------|-------|---------|-------|
| | | Dollars | Cents |
| | | | |
| | | | |
| | | | |

List of articles selected by debtor

The articles which I hereby select from the foregoing schedule, and which I wish to retain, are as follows:

| | Articles | Value | |
|-------|----------|---------|-------|
| | | Dollars | Cents |
| | | | |
| | | | |
| | | | |

Given under my hand this day of
 19..

.....

State of Illinois, } ss.
 county. }

..... debtor, as aforesaid, being duly sworn, deposes and says that the above is a true and full schedule of all

his personal property of every kind and character, including money on hand and debts due and owing to

Subscribed and sworn to before me this day of 19..

.....
.....

Oath of appraisers

We and each of us do solemnly swear that we will fairly and impartially appraise the personal property of, debtor.

.....
.....
.....

Subscribed and sworn to before me this day of, 19..

.....
.....

Certificate of appraisers

State of Illinois, } ss.
..... county. }

The undersigned, three householders, duly summoned and sworn to appraise the personal property of debtor, do hereby certify that we have fairly and impartially appraised the articles enumerated in the schedule hereto annexed, and have set down in a column opposite each article contained in said schedule the fair valuation thereof, as affixed by us, we having first taken the oath required by law.

Given under our hands this day of, 19..

.....
.....
.....

2672 Notice

To and, its attorney:

Take notice that on the day of, 19.., at the hour of o'clock .. M., the undersigned will make application to the county court of county, Illinois, at the usual place of holding said court at the court house in the city of, in said county, to be discharged from arrest or imprisonment under and by virtue of a certain writ of *capias ad satisfaciendum* issued out of the clerk's office of the court of said county, bearing date the day of, 19.., upon a certain judgment rendered by said court

at the term thereof in favor of the said
 and against me, the said, for the sum of
 dollars and costs, which application for discharge will be made
 under the provisions of the statutes in relation to "Insolvent
 Debtors."

Dated, etc.

.....
 (Debtor)

2673 Bail or appearance bond (Ill.)

⁴ The condition of the above obligation is such, that whereas
 the said, who has been arrested by virtue of a
 writ of *capias ad satisfaciendum* issued by court
 of county, in the state of Illinois, in favor of
 said for the sum of dollars and
 costs, and is now in the due custody of the sheriff of said county
 of under and by virtue of said writ of *capias ad*
satisfaciendum, has appeared before the honorable county
 court of said county of and filed his petition
 praying that he may be released from such arrest, under and
 by virtue of the provisions of an act of the general assembly
 of the state of Illinois, entitled "An Act concerning insolvent
 debtors," and said court has continued the examination of
 said debtor to, the day of,
 19.., at o'clock in the noon.

Now, if the said shall appear before said county
 court at the court house in, in said county, on the
 day and hour last above named, and from day to day there-
 after until said matter shall be finally disposed of by said
 court, and shall make due assignment of all his estate, lands,
 tenements, hereditaments, goods, chattels and effects, not ex-
 empt from execution, and deliver the same to his assignee, if
 one shall be appointed by said court, or in case he shall not be
 allowed to make such assignment, shall surrender himself to
 the officer into whose custody he may be ordered by court, and
 abide the order of the court; and shall also pay such costs ac-
 crued and accruing, as are or shall be taxable and chargeable
 against him under said application and proceedings before
 said county court, then this obligation shall be void; otherwise
 to be and remain in full force and virtue.

(Signatures and seals)

Approved this day of, 19..
, County Judge.

⁴ Precede this by the usual obliga-
 tion by the debtor and (John Doe)
 as surety in favor of the arresting

creditor for double the amount of
 his judgment.

2674 Order of release

(Caption)

This day comes the petitioner herein in the custody of the sheriff of this county and accompanied by counsel, and said arresting creditor also comes in person and by counsel. And thereupon, after a hearing, it is ordered by the court that the further hearing on said petition be, and it is hereby continued. It is further ordered that the said petitioner and he is hereby released from arrest and custody herein until the next hearing on said petition upon filing herein an appearance bond. And thereupon said petitioner presents his said bond and the same is hereby approved by the court. Whereupon, it is further ordered that said petitioner be released from his said arrest in accordance with the foregoing order of the court.

DEFENSES

2675 Plea denying malice

| | | |
|----------------------------|---|-------------------|
| In the matter of the peti- | } | Insolvent debtor. |
| tion of | | |
| | | |
| Arrested at the suit of | | |
| | | |

Now come the said named in the petition of the said as plaintiffs, and deny that malice was not of the gist of the action in the court in said petition referred to, and hence they pray judgment, etc.⁵

TRIAL

2676 Jury

Neither a verdict nor a waiver of a jury is necessary to the issuance of a *capias ad satisfaciendum*; but after a *capias ad satisfaciendum* had been issued and the debtor had been arrested, the imprisonment can not be continued without a jury trial of the allegations contained in the affidavit upon which the writ had issued.⁶

VERDICT

2677 Guilty

We, the jurors, find the said defendant,, guilty of unjustly refusing to surrender his estate in satisfaction of the execution.

⁵ Kellar v. Norton, *supra*.

(1896); Sec. 4, art. 11, Laws 1895

⁶ Boos v. White, 64 Ill. App. 177

(p. 214).

We, the jurors, further find the said defendant, , guilty of fraudulently disposing of his property with a design of hindering and delaying his creditors.

(Signatures)

2678 Not guilty

We, the jury, find the petitioner, , is entitled to a discharge from arrest as prayed in the petition.

(Signatures)

JUDGMENT

2679 Releasing debtor (Ill.)

(Caption)

This day again comes the said petitioner in person and by his counsel and said arresting creditors in person and by counsel also come, and said cause coming on to be heard upon the petition of said to be released from his said arrest, and thereupon issues being joined, on the agreement of the parties a trial by jury is waived and said cause is submitted to the court for trial without the intervention of a jury. After hearing all the evidence adduced and the arguments of counsel, and now being fully advised in the premises, the court finds the issues for the said petitioner, and the court further finds that malice was not of the gist of the action of the said respondents against the said in the court of county, Illinois. Whereupon, the said respondents submit herein their motion for a new trial in said cause, which motion, after a hearing, is overruled by the court and a new trial denied.

And thereupon it is ordered and adjudged by the court that said petitioner, , be and he is hereby discharged from the custody of the sheriff of county. And thereupon it is considered by the court that the said do have and recover of and from the said respondents, , his costs and charges in this behalf expended and that he have execution therefor. To which finding, order and judgment of the court, the said respondents now here duly except and pray an appeal therefrom to the appellate court in and for the district of Illinois, which is allowed upon said respondents filing within days from this date their bill of exceptions and their appeal bond in the penal sum of dollars with sureties thereon to be approved by the court.

APPEAL

2680 Jurisdiction

Since 1877 and by section 8 of the Appellate Court act, which impliedly repealed section 26 of the Insolvent Debtor act, appeals must be prosecuted to the appellate and not to the circuit court.⁷

2681 Bond, debtor's

Know all men by these presents, that we,, as principal., and, as surety, of the city of, county of and state of Illinois, are held and firmly bound unto ⁸ (the people of the state of Illinois) in the penal sum of dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness our hands and seal, this day of, 19...

The condition of the above obligation is such that,

Whereas, the above bounden was on the day of, 19..., arrested and imprisoned upon a *capias ad satisfaciendum* issued by and out of the court of county, in the state of Illinois (or by, a justice of the peace in and for said county of and state of Illinois), in a certain cause wherein was plaintiff, and the said was defendant;

And, whereas, the said, desiring to release his body from such arrest and imprisonment, under and by virtue of an act of the general assembly of the state of Illinois, entitled, "An Act concerning insolvent debtors," in force July first, 1872, afterwards, to wit, on the day of, 19..., applied to the county court of county, in the state aforesaid, to be discharged under the provisions of the aforesaid act;

And, whereas, afterwards, to wit, on the day of, 19..., the said application coming on to be heard in said county court, it was then and there, by the said county court, finally ordered and adjudged, in the matter of the said application, that (Insert special matter), from which said final order and judgment of the said county court, the said has prayed for and obtained an appeal to the appellate court for the district in said state:

Now, therefore, if the said will prosecute his said appeal with effect, and in case the appeal is dismissed,

⁷ Groszglass v. Von Bergen, 220 Ill. 342.

⁸ Use name of people, etc., on appeal by debtor; insert name of debtor for creditors' appeal.

or the order or judgment of the said county court is affirmed, in whole or in part, he will perform the same, and will appear before and abide whatever decision the said appellate court shall make in the premises, and pay all costs that may be awarded against him, the said; and, also, that he will not sell or dispose of any of his estate pending such appeal, but that the same shall be forthcoming and subject to the order of the said county court, then the above obligation to be void; otherwise to remain in full force and effect.

(Signatures and seals)

Approved in open court, this day of, 19..

Judge of the county court of county, Illinois.

Surety's oath

State of Illinois, }
..... county. } ss.

I,, do solemnly swear that I am worth, over and above all my just liabilities, the sum of dollars, and that I am the owner in fee simple of the following described real estate, located in county, Illinois, (Insert description).

Subscribed, etc.

2682 Bond, creditors

⁹ Now, therefore, if the said and shall prosecute said appeal with effect, and pay all costs and damages that may accrue to the said in case the said final order and judgment shall be affirmed in said appellate court, then the above obligation to be void; otherwise to remain in full force and effect.

(Signatures, etc.)

⁹ Same as in debtor's bond to star.

CHAPTER XL

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2785 *In personam*

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IN GENERAL

2683 Attachment defined

An attachment is a statutory method for the commencement of an action and the taking of legal possession of a debtor's

general property to secure the payment of an indebtedness to be established in the same proceeding, which is to be satisfied out of the property that has been seized.

2684 History and origin

Foreign attachment existed in some parts of England as a local custom, but not as a common law proceeding.¹ For an able and full discussion of the origin and history of attachment, see *Allen case*.²

PROPERTY SUBJECT

2685 Debts not due

An attachment may issue to reach an indebtedness which is not yet due.³

2686 Property of foreign corporation

The property of a foreign corporation was considered attachable under a former Illinois Attachment act authorizing attachments against "persons."⁴ The present Illinois statute employs the word "debtor" in place of "persons." The term debtor is broader than person, and as the provision concerning the construction of statutes has been also made broader, the property of a foreign corporation is subject to an attachment under the present statute.⁵

2687 Shares of stock

Shares of capital stock of a corporation in the hands of the holder are subject to attachment.⁶

JURISDICTION

2688 Ex delicto actions

An original attachment is maintainable in an *ex delicto* action by waiving the tort and suing in *assumpsit*.⁷

¹ *Hannibal & St. Joseph R. Co. v. Crane*, 102 Ill. 249, 258 (1882).

² *Baltimore & Ohio R. Co. v. Allen*, 58 W. Va. 388, 392 (1905).

³ *Yale v. McDaniel*, 69 Miss. 337, 338 (1891); Sec. 146, Code 1906.

⁴ *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 18 (1859); Sec. 1, c. 9, Rev. Stat. 1845 (Sec. 14, Hurd's Stat. 1911, p. 96).

⁵ *Voss v. Evans Marble Co.*, 101 Ill. App. 373, 377 (1902); Par. 5, sec. 1, c. 131, Hurd's Stat. 1909.

⁶ *Pease v. Chicago Crayon Co.*, 235 Ill. 391, 394 (1908).

⁷ *May v. Disconto Gesellschaft*, 211 Ill. 310, 315 (1904).

PLEADING AND PRACTICE

2689 Illinois

The General Practice act controls matters of practice in attachment proceedings, unless otherwise provided by the Attachment act.⁸

AFFIDAVIT

2690 Nature

An affidavit in attachment is jurisdictional,⁹ and the filing of the affidavit is the commencement and the foundation of the suit.¹⁰

REQUISITES

2691 Statutory requirements

An affidavit in attachment should state only such material allegations as are required by statute.¹¹

2692 Title

An affidavit in attachment is valid without a title if by reference it sufficiently discloses the title of the suit in which it has been filed.¹²

2693 Agent or attorney

An agent or an attorney should name the plaintiff for whom he deposes; but an omission to do so will not invalidate the affidavit if enough is stated therein to identify the plaintiff. Under Michigan practice a plaintiff is sufficiently identified by referring to him as being the plaintiff named in the writ of attachment which is attached to and filed with an affidavit in a certain case.¹³ The statement of an affiant that he is the agent or the attorney of the plaintiff implies that the affidavit is made in the plaintiff's behalf.¹⁴

⁸ *Sherburne v. Hyde*, 185 Ill. 580, 586 (1900); Sec. 26, c. 11, Hurd's Stat. 1909.

⁹ *Inman v. Allport*, 65 Ill. 540, 542 (1872).

¹⁰ *Eddy v. Brady*, 16 Ill. 306, 307 (1855); *Pullian v. Nelson*, 28 Ill. 112, 116 (1862); *Buck v. Coy*, 73 Ill. App. 160, 163 (1898).

¹¹ *Stringer v. Dean*, 61 Mich. 196, 202 (1886).

¹² *Beebe v. Morrell*, 76 Mich. 114, 120 (1889).

¹³ *Stringer v. Dean*, 61 Mich. 201.

¹⁴ *Stringer v. Dean*, *supra*.

2694 Residence

It is not necessary to state in an affidavit in attachment the residence of either party when the statute does not require it.¹⁵

2695 Grounds, nonresidence

Residence in another county than that in which a person transacts business is no ground of attachment on account of non-residence.¹⁶

2696 Grounds, disjunctive

The grounds of attachment may be stated in the disjunctive, if they can be treated as stating one good ground of attachment and the affidavit follows the words of the statute.¹⁷ But an affidavit in attachment is void for uncertainty when the disjunctive is used to connect two distinct facts of different natures.¹⁸ An affidavit in attachment is valid if one or more causes of attachment are well stated and sustained, although it might contain causes that are not sufficiently set forth.¹⁹ A defective attachment affidavit is voidable, and not void.²⁰

2697 Amount

The averment of the amount due in an affidavit in attachment is not jurisdictional when made in good faith.²¹

2698 Oath, Illinois

Under a former statute, an affidavit in attachment was good if it was made before a foreign notary public having power by the law of his domicile to take affidavits.²² The provision referred to is no longer a part of the statutory law of Illinois, but there is a similar provision which authorizes oaths to be taken out of the state.²³

¹⁵ *Stringer v. Dean*, 61 Mich. 202.

¹⁶ *Boggs v. Bindskoff*, 23 Ill. 66 (1859).

¹⁷ *Jones v. Peek*, 101 Mich. 389, 390 (1894).

¹⁸ *Emerson v. Detroit Steel & Spring Co.*, 100 Mich. 127, 131 (1894).

¹⁹ *Lawver v. Langhans*, 85 Ill. 138, 140 (1877).

²⁰ *Hogue v. Corbit*, 156 Ill. 540, 544 (1895).

²¹ *Emerson v. Detroit Steel & Spring Co.*, 100 Mich. 133.

²² *Mineral Point R. Co v. Keep*, 22 Ill. 17; *Scathes' Comp. Stats.*, p. 235, sec. 32.

²³ Sec. 6, c. 101, *Hurd's Stat.* 1909.

FORMS

2699 District of Columbia

(Caption)

Personally appeared before me, who, first being duly sworn, on his oath declares and says: *a*, That he makes this affidavit as plaintiff in the declaration filed herewith and set forth wherein he is plaintiff and is defendant; *b*, that he knows that the said defendant is a nonresident of the District of Columbia and is not a resident of the said District, and that the defendant fraudulently contracted the debt and incurred the obligation respecting which this action was brought; *c*, that he, the said plaintiff, has a just right to recover against the said defendant what he claims in the declaration filed as aforesaid, viz.: the sum of dollars, with interest on from for the cause of action set forth in the declaration, which is made a part hereof and the statements in which are true; and that the said defendant has personal estate in and debts owing to him in the District of Columbia.

.....
 Subscribed, etc.²⁴

2700 Florida

(Venue)

Before the subscriber,, a notary public for the state of Florida, personally came, who, being first duly sworn, says that his name is; that he is president of, a corporation organized and existing under and by virtue of the laws of the state of Florida, and that he is duly authorized to act herein; that, a corporation organized and existing under and by virtue of the laws of, in the United States of America, is indebted to said in the sum of dollars and cents; that the same is actually due; and that affiant has reason to believe and does believe, that said resides beyond the limits of the state of Florida.

.....
 Subscribed, etc.

²⁴ With the foregoing is filed an "affidavit supporting," which, in all particulars, is the same as the original affidavit in attachment except that it is made by another affiant and at the commencement of clause *c* it should contain the additional statement that the affiant "is

acquainted with the business relations of the said plaintiff and defendant and knows that," etc. The declaration, the original affidavit and the affidavit supporting are filed at the same time and as one instrument.

2701 Illinois

State of Illinois, }
 County of } ss.

In the circuit court of county.

....., being duly sworn, deposes and says that indebted to after allowing all just credits and set offs, in the sum of dollars and cents, upon (a certain contract for the price and value of stock in the company, to wit, for the price and par value of three hundred and twenty-five shares of such stock) and affiant further states that the said is not a resident of this state, and that place of residence is at (that upon diligent inquiry, affiant has not been able to ascertain place.. of residence.. conceal sel.. or stand.. in defiance of an officer, so that process can not be served upon ha.. departed from this state, with the intention of having effects removed from this state is about to depart from this state, with the intention of having effects removed from this state and is about to remove property from this state to the injury of the said ha.. within two years last past, fraudulently conveyed or assigned effects, or a part thereof, so as to hinder and delay creditors ha.. within two years last past, fraudulently concealed or disposed of property so as to hinder and delay his creditors and is about fraudulently to conceal, assign or otherwise dispose of property or effects so as to hinder or delay creditors), and further deponent sayeth not.

.....

Subscribed, etc.

2702 Maryland

(Venue)

Be it remembered, and it is hereby certified, that on this day of, in the year 19.., personally appeared before the subscriber, a notary public, of the state of Maryland, in and for the city of, and, co-partners, trading as "..... company," and made oath in due form of law,²⁵ that the company of, a body corporate, not being a citizen of the state of Maryland, and not residing therein, is justly and bona fide indebted unto the said and, co-partners, trading as "..... company," in the full and just sum of

²⁵ Or "who being conscientiously scrupulous of taking an oath, did solemnly and truly declare and af-

firm on the five books of Moses, he being an Israelite,"

..... dollars and cents (.....), over and above all discounts. And at the same time, the said and, co-partners, trading as "..... company," produced to me the open accounts, on and by which the said company of, is so indebted, which are hereunto annexed, and the said and, co-partners, trading as "..... company," did also make oath, as aforesaid, that the plaintiff is credibly informed, and verily believes that the said company of, is not a citizen of the state of Maryland, and does not reside therein.²⁶

Witness my hand and notarial seal.

.....
Notary Public.²⁷

[SEAL]

2703 Michigan

(Venue)

....., of said county, being first duly sworn, deposes and says that he is a member of the firm of; that said firm is composed of and himself; that and are justly indebted to the said composing the firm aforesaid, in the sum of dollars as near as may be, over and above all legal set-offs, and that the same is now due to the said from the said upon express con-

²⁶ Or give any other of the following grounds:

That the said.....about to abscond from this state.

That the said.....h.... assigned, disposed of, or concealed, or about to assign, dispose of, or conceal. h.... property, or some portion thereof, with intent to defraud. h.... creditors.

That the said.....fraudulently contracted the debt or incurred the obligation aforesaid.

That the said.....h.... removed or about to remove. h.... property, or some portion thereof, out of the state, with intent to defraud. h.... creditors.

²⁷ To the foregoing affidavit, there may be attached a declaration consisting of the common assumpsit counts, a notice to plead, and the following *praecipe* endorsed on the back:

Mr. Clerk:

Please file the within affidavit and Narr. and notice to plead, issue

summons and attachment thereon, and send two copies of the Narr. and notice, one to be set up at the court house door, and the other to be served upon the defendant by the sheriff.

.....
Plaintiff's attorney.

Or a declaration as follows:
(Caption)

This suit is instituted to recover the sum of dollars due and owing from the defendant.. to the plaintiff., for

(Add common assumpsit counts)

.....
Attorney for plaintiff.

And endorsed—

Mr. Clerk:

Please file the within affidavit, voucher and short note, issue summons and attachment thereon, and send copy of the short note, to be set up at the court house door by the sheriff.

.....
Plaintiff's attorney.

tract. Deponent further says that he knows that the said and are not residents of the state of Michigan and neither of them have resided in this state for months immediately preceding the time of the making of this affidavit, to wit, the day of, 19..; and that said and have property in this county subject to attachment; and further deponent saith not.

Subscribed, etc.²⁸

2704 Mississippi

State of Mississippi, county, district.

Before me,, clerk of the circuit court of said county, this day personally appeared, who makes oath that to the best of his knowledge and belief is justly indebted to in the sum of dollars and cents; said furthermore makes oath:

(1) That the defendant is a foreign corporation, or a non-resident of this state;

(2) That ..he.. ha.. removed, or about to remove or property out of this state;

(3) That ..he.. so abscond.. or conceal that he cannot be served with a summons;

(4) That ..he.. contracted the debt or incurred the obligation in conducting the business of a ship, steam-boat, or other water-craft, in some of the navigable waters of this state;

(5) That ..he.. ha.. property or rights in action which ..he.. conceal.. and unjustly refuse.. to apply to the payment of debts;

(6) That ..he.. ha.. assigned or disposed of, or about to assign or dispose of property or rights in action, or some part thereof, with the intent to defraud creditors;

(7) That ..he.. ha.. converted, or about to convert property into money or evidences of debt, with intent to place it beyond the reach of ..he.. creditors;

(8) That ..he.. fraudulently contracted the debt or incurred the obligation for which suit has been or is about to be brought;

(9) That ..he.. buying, selling, or dealing in, or ha.. within six months next before this suing out of attachment, directly or indirectly bought, sold, or dealt in future contracts, commonly called "futures;"

(10) That ..he.. in default for public money, due from as principal.., to the state, or some county, city, or town or village thereof;

²⁸ *Sword v. Lane*, 71 Mich. 284 (1888).

(11) That defendant is a banker, banking company, or corporation, and received deposits of money, knowing at the time was insolvent; or has made or published a false or fraudulent statement as to financial condition.

Wherefore, affiant pray the issuance of writ of attachment against the estate, real and personal, of the said

Sworn to and subscribed before me, this, the day of, 19..

.....
Clerk of circuit court.

By.....D. C.

2705 Virginia

(Caption)

....., the plaintiff in this suit, maketh oath and saith that he believes the claim, for which the above entitled action is instituted, to be just; that he believes he is entitled to and ought to recover in said action \$. at the least, with interest thereon, to be computed at the rate of .. per centum per annum, from the day of, 19.., till paid; and to the best of his belief the said defendant is not a resident of this state, and has estate or debts owing to him within the city of and is removing, or intends to remove, or has removed his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this state, so that process of execution on a judgment, when obtained in said action will be unavailing.²⁹

Subscribed and sworn to before me this day of, 19..

.....
Deputy Clerk.

²⁹ Or in place of the foregoing give the following grounds:

Is a foreign corporation, and has estate or debts owing to said defendant within the city of, or is sued with a defendant residing therein; or,

Is removing, or about to remove, out of this state with intent to change his domicile; or,

Is removing, intends to remove, or has removed the specific property sued for, or his own estate, or the proceeds of the sale of his property or a material part of such estate or proceeds, out of this state, so

that process of execution on a judgment when obtained in said action will be unavailing; or,

Is converting, or is about to convert, or has converted, his property of whatever kind, or some part thereof into money, securities or evidences of debt, with intent to hinder, delay or defraud his creditors; or,

Has assigned or disposed of, or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay or defraud his creditors.

2706 West Virginia

State of West Virginia, }
 County, } ss.

Before, clerk of the said court, this day, in the clerk's office thereof, came, one of the plaintiffs, and made oath in due form of law that the plaintiffs above named are justly entitled to recover in said action against the above named defendant the sum of dollars, with interest thereon from the day of, 19.., until payment, and that the said claim is for damages for the breach by the defendants of a certain contract theretofore by it made with the plaintiffs to deliver to the plaintiffs certain in said contract specified, and that the defendant is a foreign corporation and a nonresident of the state of West Virginia, and that the material facts upon which the said plaintiff relies to show the existence of the grounds upon which this application for an attachment in this action is based are as follows, viz.: (State facts).

Given under my hand this day of, 19..
, Clerk.

2707 Filing

The affidavit in attachment should be filed and the writ issued within a reasonable time of the swearing to the affidavit.³⁰ The intervention of eleven days between the swearing and the filing is unreasonable.³¹

2708 Evidence

An affidavit in attachment cannot be used as proof of the amount of plaintiff's damages.³²

2709 Effect

The affidavit in attachment and not the declaration confers jurisdiction upon the court in an attachment proceeding.³³

2710 Amendment, generally

An affidavit in attachment is amendable in matter of form, but not in matter of substance, unless there is a special statute

³⁰ Buck v. Coy, *supra*.

³¹ Foster v. Illinski, 3 Ill. App. 345, 346 (1879).

³² Boggs v. Bindskoff, 23 Ill. 67.

³³ May v. Disconto Gesellschaft, *supra*.

authorizing amendments in attachment.³⁴ An affidavit in attachment or in attachment in aid is amendable under Illinois practice.³⁵

2711 Amendment; form and substance, test

The averments in an affidavit in attachment are considered matters of substance if they support an action for perjury, if false; all other averments in such an affidavit are matters of form.³⁶

2712 Amendment, indebtedness and nonresidence

An attachment affidavit is amendable with respect to the nature of the indebtedness, and the nonresidence of the defendant.³⁷

2713 Amendment, parties

No substitution of new defendants in attachment can be made without the filing of a new affidavit as to the defendants to be substituted.³⁸

SECURITY FOR COSTS

2714 Illinois

A nonresident plaintiff in attachment must furnish security for cost notwithstanding the giving of an attachment bond.³⁹

BOND

2715 District of Columbia

Know all men by these presents, that we,, as principal., and, as suret. . . ., are held and firmly bound unto the above named in the full sum of dollars to be paid to the said ex-ecutors, administrators, successors, or assigns. To which pay-ment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents. Sealed with our seals, and dated this day of, 19..

³⁴ Emerson v. Detroit Steel & Spring Co., 100 Mich. 132; Freer v. White, 91 Mich. 74, 76 (1892).

³⁵ Bailey v. Valley National Bank, 127 Ill. 332, 336 (1889); Sec. 28, c. 11, Hurd's Stat. 1909, p. 196; Keith v. Ray, 231 Ill. 213, 215 (1907).

³⁶ Emerson v. Detroit Steel &

Spring Co., *supra*; Freer v. White, *supra*.

³⁷ Hogue v. Corbit, *supra*.

³⁸ Inman v. Allport, *supra*.

³⁹ Casey v. Horton, 36 Ill. 234, 238 (1864); Sec. 1, c. 33, Hurd's Stat. 1909.

Whereas, the above named has sued out a writ of attachment against the lands and tenements, goods, chattels, and credits of the said defendant found in the District of Columbia;

Now, therefore, the condition of this obligation is such, that if the above named shall make good to the said defendant... all costs and damages which ..he.. may sustain by reason of the wrongful suing out of said attachment, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

Sealed and delivered in the presence of

(Signatures and seals)

Approved the day of, 19..

By, Clerk.
By, Assistant Clerk.

2716 Florida

(Caption)

Know all men by these presents, that we,, a corporation organized and existing under and by virtue of the laws of the state of Florida, as principal, and, a corporation organized and existing under and by virtue of the laws of the state of, as surety, are held and firmly bound unto, a corporation organized and existing under and by virtue of the laws of in the United States of America, in the sum of dollars, for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors jointly and severally, firmly by these presents.

Signed and sealed this day of, 19..

The condition of the above obligation is such that whereas the said has this day applied for an attachment against the lands, tenements, goods and chattels of said for the sum of dollars and cents;

Now, if the said shall well and truly pay all costs and damages which the defendant, the said, may sustain in consequence of the plaintiff's improperly suing out said attachment, then this obligation to be void; else to remain in full force and virtue.

By
its president.

(Corporate seal)

Attest:

.....Secretary.⁴⁰

⁴⁰ Add other signatures and seals in similar manner.

Taken before and approved by me this day of
, 19...

.....
 Clerk circuit court.

2717 Illinois

⁴¹ The condition of the above obligation is such, that, whereas, the above moun den ha., on the day of the date hereof, prayed an attachment out of the circuit court of county, at the suit of against the estate of the above named for the sum of dollars and cents, and the same being about to be sued out of said court, returnable on the Monday of, 19.,, to the term of the said court then to be holden;

Now, if the said shall prosecute said suit with effect, or in case of failure therein, shall well and truly pay and satisfy the said all costs in said suit, and such damages as shall be awarded against the said heirs, executors or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void; otherwise to remain in full force and effect.

(Signatures and seals)

Approved,

.....
 Clerk.

2718 Mississippi

State of Mississippi, }
 county, } ss.
 district. }

Know all men by these presents, that we, principal, and, sureties, are held and firmly bound unto in the sum of dollars, for which payment, well and truly to be made, we bind ourselves, our heirs and legal representatives jointly and severally, firmly by these presents.

Signed with our names this day of, 19...

The condition of the above obligation is, that whereas, the above bound pray an attachment against the estate of the said for the sum of dollars, returnable to the circuit court of county, district, on the day of, 19...

⁴¹ Precede by obligation as in case of other bonds.

Now, if the said plaintiff shall pay to the said defendant all such damages as he shall sustain by the wrongful suing out of the attachment, and all costs which may be awarded against the plaintiff in said suit, then the obligation shall be void; but otherwise it shall remain in force.

(Signatures)

I approve the foregoing bond, this the day of , 19...

..... Clerk.
..... D. C.

Sureties' oath

State of Mississippi, }
..... county, } ss.
..... district. }

Personally appeared before me,, clerk of the circuit court in and for said county and state,, sureties to the foregoing bond, who, being by me duly sworn depose and say that they own, over and above all their legal liabilities, visible property subject to execution and not exempt by law from sale or debt:

The said of the value of dollars,
The said of the value of dollars.

(Signatures)

Sworn to and subscribed before me, this day of , 19...

..... Clerk.
By D. C.

2719 Virginia

Know all men by these presents, that we are held and firmly bound unto in the sum of dollars, to the payment whereof we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. We hereby waive the benefit of our exemption as to this obligation, and we also waive any claim or right to discharge any liability to the commonwealth of Virginia arising under this bond with coupons detached from bonds of the state of Virginia. Witness our hands and seals this day of , 19...

The condition of the above obligation is such, that whereas⁴² plaintiff in a suit instituted in the circuit court

⁴² If attachment writ is issued by a justice of the peace insert instead of matter in stars the following:

..... a justice of the peace for the of did on the day of 19..., on the complaint of the above bound on oath, issue an attachment in favor of the said against the

estate of for the amount of the claim of the said specified in said attachment and sworn to on oath by the said who also made oath to the justice of the said claim, which attachment is returnable

in the county of, against defendant has upon affidavit, made in due form of law, sued out of the clerk's office of the said court, an attachment against the estate of the said for the sum of dollars, being the amount claimed by the said plaintiff in the said suit.

Now, therefore, if the said shall pay all costs and damages which may be awarded against or sustained by any person by reason of suing out the said attachment, then the above obligation to be void, otherwise to remain in full force.

(Signatures and seals)

Entered in the presence of

.....

Surety's oath

In the clerk's office of the circuit court
of the county of

....., 19..

..... the security in the above bond, this day made oath before me clerk of the said court, that his estate, after the payment of all his debts and of such liabilities as he has incurred for others and expects to have to pay, is worth \$...... the penalty of the said bond, and said bond is approved by me and filed.

Given under my hand this day of, 19...

.....

2720 West Virginia

Know all men by these presents, that we are held and firmly bound unto the state of West Virginia in the sum of dollars to the payment whereof well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of, 19...

The condition of the above obligation is such, that whereas the above bound is about to sue out of the clerk's office of the circuit court of county in an action of therein pending wherein plaintiff.. and defendant.. an attachment against the estate of the said defendant.. for \$......

Now, therefore, if the above bound shall well and truly pay all costs and damages which may be awarded against or sustained by any person by reason of suing out said attachment and shall also pay, to any claimant, of any property seized, or sold under or by

virtue of said attachment, all damages which he may recover in consequence of such seizure, or sale; and shall also warrant and defend, to any purchaser of such property, such estate or interest therein as is sold, then the above obligation to be void, otherwise to remain in full force and virtue.

(Signatures and seals)

Signed, sealed and acknowledged, and security approved before me this day of, 19...

Teste:

.....

Clerk circuit court.

2721 Objections, waiver

Irregularities in an attachment bond must be urged in the trial court, where they may be obviated by an amendment: they are waived if not so urged.⁴³ Objections to a defective attachment bond come too late if made for the first time in the reviewing court.⁴⁴

2722 Withdrawal, motion (D. C.)

(Caption)

Now come the said plaintiffs by their attorney and move the court to pass an order allowing them to withdraw from the files of the court the bond heretofore filed in the above entitled cause upon leaving a copy thereof and the receipt therefor with the clerk of the court, and assign the following reasons for their motions:

1. Because the attachment has been dismissed and the writ ordered to be returned by the marshal "countermanded."

2. Because the defendant herein had been summoned and he and the plaintiffs had agreed that the proceedings upon said attachment be discontinued and said defendant hath deposited with the the sum of dollars in cash in trust to abide the result of this suit.

3. And for other reasons to be hereafter assigned.

.....

Attorney for plaintiff.

Leave granted as prayed.

.....

Justice.

⁴³ *Lawver v. Langhans, supra.*

⁴⁴ *Morris v. School Trustees*, 15 Ill. 266, 268 (1853); *Meire v.*

Brush, 3 Scam. 21, 23 (1841); *Lawver v. Langhans, supra.*

WRIT

2723 District of Columbia

(Caption)

The President of the United States to the marshal for said district, greeting:

You are hereby commanded to attach, seize, and take into your custody the defendant.. lands and tenements, property, and credits which shall be found in this district, to the value of \$....., with interest, being the amount of the plaintiff.. demand against the defendant.., as shown by ..h.. affidavit.., duly supported and filed, and claimed in ..h.. declaration; and the further sum of \$....., for the costs and charges which may accrue in the premises; and the same, so attached, safely keep, subject to the orders of the court, unless the defendant.. or the person in whose possession the property is attached, deliver to you, to be filed herewith, his undertaking, with sufficient surety or sureties, to abide by and perform the judgment of the court in relation to said property. And should you attach the defendant.. property or credits in the possession of any other person or persons than the defendant.. you shall notify such person or persons of such seizure by virtue of this writ of attachment, and serve a notice upon h.. or them, as well as on said defendant.., to appear in said court on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the service of said notice, to show cause, if any there be, why the property or credits so attached should not be condemned and execution thereof had.

Witness, the honorable, chief justice of said court, the day of, 19...

....., Clerk.

By, Assistant Clerk.

Notice

....., 19..

To, defendant..,, garnishee...

You are hereby notified to appear in the supreme court of the District of Columbia on or before the twentieth day, exclusive of Sundays and legal holidays, after service hereof, and show cause, if any there be, why the property, credits, etc., of the said defendant.., seized by virtue of the foregoing writ of attachment in the hands of, garnishee.., of which seizure the said garnishee is hereby notified, should not be condemned and execution thereof had.

.....

United States marshal.

ing to him the original of said writ in county, Florida, the president, vice-president, or other head or officer of said company, being absent from said county.

(Signatures)

(Illinois)

2725 Return day

A writ of attachment must be made returnable to the next succeeding term of court, regardless of the number of days that intervene between the issuing of the writ and the convening of the court.⁴⁵

2726 Testing, waiver

The writ should be tested in the name of the clerk, and not in the name of the judge or court. The omission to properly test the writ is a formal defect which is waived by an appearance without specific objection,⁴⁶ and it may be obviated by an amendment.⁴⁷

2727 Seal

The seal of the court is necessary to the validity of an attachment writ.⁴⁸

2728 Writ and return

State of Illinois, } ss.

..... county. }

The people of the state of Illinois, to the sheriff of county, greeting:

Whereas, hath complained that defendant justly indebted to plaintiff.. to the amount of dollars and cents, and that the said defendant.. is not a resident.. of this state, and that his place.. of residence is at that upon diligent inquiry, affiant has been unable to ascertain place.. of residence conceal sel.. or stand.. in defiance of an officer, so that process cannot be served upon ha.. departed from this state, with the intention of having effects removed from this state is about to depart from this state, with the intention of having effects re-

⁴⁵ Mechanics' Savings Institution v. Givens, 82 Ill. 157, 159 (1876); Sec. 6, Attachment act (Hurd's Stat. 1909, p. 193).

461 (1849); Sec. 6, c. 11, Hurd's Stat. 1909, p. 193).

⁴⁷ Norton v. Dow, *supra*.

⁴⁸ Williams v. Vanmetre, 19 Ill. 293, 294 (1857).

moved from this state and is about to remove property from this state to the injury of the said ha.. within two years last past, fraudulently conveyed or assigned effects, or a part thereof, so as to hinder and delay creditors ha... within two years last past fraudulently concealed or disposed of property, so as to hinder and delay creditors about fraudulently to conceal, assign or otherwise dispose of property or effects so as to hinder or delay creditors And the said plaintiff.. having given bond and security according to law:

We therefore command you, that you attach so much of the estate, real or personal, of the said defendant to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the complaint; and such estate so attached in your hands, to secure, or so provide that the same may be liable to further proceeding thereupon according to law, and that you summon the said defendant to appear and answer the complaint of the said plaintiff.. at a term of said circuit court of county, to be holden at, in the county of, upon the day of, 19.., and that you also summon and such other persons as you shall be required by the said plaintiff.. as garnishees to be and appear at the said court on the said day of, 19.., then and there to answer to what may be objected against them, when and where you shall make known to the said court how you have executed this writ. And have you then and there this writ.

Witness, clerk of the said court, and the seal thereof, at, in said county, this day of, 19...

....., Clerk.

2729 Return, time

In the absence of statute the lien of the attachment levy is not affected by the officers' failure to return the writ on the precise day.⁴⁹

2730 Return, service on garnishee

Pd. (\$.....)

I served this writ on the within named, as garnishee, by delivering a copy thereof to (treasurer) of said company this day of, 19.., at (a. m.) After diligent search, I was not able to find the president of said company in my county.

⁴⁹ *Hogue v. Corbit*, 156 Ill. 546.

Also, on the day of, 19.., I delivered an attested copy of the within writ to treasurer of said company and at the same time demanded of him a certificate of the number of shares and the amount of the interest held by said defendant in said company, and not being able to receive any number of shares and amount of interest of said defendant, I return this writ no property found in my county. By diligent inquiry the secretary of said company was not found in my county.

.....Sheriff.

ByDeputy.

2731 Levy, effect

By the levy of an attachment writ the creditor acquires no better right to the property attached than his debtor has when the writ is levied.⁵⁰

2732 Maryland

..... county, Set.,

State of Maryland,

To the sheriff of county, greeting:

Whereas, on the day of, 19.., a certain and, partners, trading as “..... company,” being desirous to order and sue out the writ of the state of Maryland of attachment against the lands, tenements, goods, chattels and credits of a certain company, of, a body corporate, appeared before, a notary public of the state of Maryland, residing in, in pursuance of the act of assembly in such case made and provided, and made oath in due form of law, that the said company, is justly and bona fide indebted unto the said “..... company,” in the full and just sum of dollars and cents, over and above all discounts, and further that he is credibly informed and verily believes that the said company of, is not a citizen of the state of Maryland, and does not reside therein.

And whereas, the said and having produced, at the time the said affidavit was made before the said clerk, the open accounts, by which the said company is indebted unto them, the said company.

Therefore, you are hereby commanded to attach, seize, take and safe keep the lands, tenements, goods, chattels and credits

⁵⁰ Walsh v. First National Bank,
228 Ill. 446, 450 (1907).

of the said company, which shall be found in your bailiwick, to the value of as well as the said sum of dollars andcents, as the incidental costs and charges, which may or shall accrue in the premises; and when you have the same so attached, or any part thereof, and the same in your custody safe keep, so that you have the same before the circuit court for county, to be held at, on the Monday of, next, then and there to be condemned, according to the act of the assembly in such case made and provided, to and for the use of the said company unless the said company by itself, or its attorney, shall appear and answer unto the said company in a plea of trespass on the case, etc., according to law; you are likewise commanded to make known to each person or persons in whose hands or possession the said goods, chattels and credits so attached are, if to him or them it shall seem meet, to be and appear, on the day and at the place aforesaid, before the said court, to show cause why such goods, chattels and credits, so attached, as aforesaid, should not be condemned, and execution thereof had and made, as in other cases of recoveries and judgments given in courts of record, according to the directions of the Code of Public General Laws, and the amendments and additions thereto aforesaid, and that you make appear unto the said court, at the place and on the day aforesaid, in what manner you shall execute this writ; and have you then and there this writ.

Witness the honorable chief judge of the said court, the day of, 19...

Issued the day of, 19...

.....

Clerk.

(Seal)

Return

Attached goods and chattels as per schedule within, set up copy of short note at court house door and summoned as garnishee, this day of, 19...
 Sheriff.

b

Laid in the hands of the by service on assistant cashier on the day of, 19., at o'clock in the noon in the presence of and garnishee summoned. Also a copy of the writ of attachment, the process in the within cause, left with said garnishee.

2733 Michigan

State of Michigan,

The circuit court for the county of

In the name of the people of the state of Michigan.

To

You are hereby notified that a suit has been commenced against you in the circuit court for the county of by, as plaintiff., and that if you desire to defend the same, you are required to have your appearance filed or entered in the cause, in accordance with the rules and practice of the court, in person or by attorney, within fifteen days after service of this summons upon you. Hereof fail not, under penalty of having judgment taken against you by default. The plaintiff.. claim.. damages in said suit not exceeding dollars.

Service of this summons shall be made on or before the day of, 19.., which is the return day hereof.

To the sheriff of said county:

We command you that you do forthwith and on or before the return day above mentioned attach so much of the lands, tenements, goods, chattels, moneys and effects of the said defendant not exempt from execution, where-soever the same may be found within said county, as will be sufficient to satisfy the demand of said plaintiff., and costs of writ, and that you make an inventory thereof, and safely keep said property to satisfy any judgment that may be recovered by said plaintiff..

And in case you shall seize any property of said defendant.. in said county, but not sufficient to satisfy said demand and costs, then you are hereby further commanded to seize other property of said defendant., subject to attachment, sufficient, with that seized in said county, to satisfy said demand and costs, wherever the same may be found within the state of Michigan.

And that you serve a copy of this writ, and a copy of such inventory, certified by you, upon the said defendant., if can be found within either county where property has been seized under this writ.

Witness the honorable circuit judge, and the seal of said court, at the of the place of holding said court, this day of, 19...

..... Clerk.

..... Deputy clerk.

..... Plaintiff's attorney.

Business address,

2734 Mississippi

State of Mississippi.

To the sheriff, coroner, or any constable of county,
.....district, greeting:

Whereas,, hath complained on oath to the undersigned, clerk of the circuit court of the county of, district, in said state, that to his best knowledge and belief justly indebted to to the amount of dollars and cents; and said having further made oath:

(1) that the defendant is a foreign corporation, or a non-resident of this state;

(2) that ..he.. ha.. removed, or about to remove or property out of this state;

(3) that ..he.. so abscond.. or conceal that ..he.. cannot be served with a summons;

(4) that ..he.. contracted the debt or incurred the obligation in conducting the business of a ship, steamboat, or other water-craft, in some of the navigable waters of this state;

(5) that ..he.. ha.. property or rights in action which ..he.. conceal.. and justly refuse.. to apply to the payment of debts;

(6) that ..he.. ha.. assigned or disposed of, or about to assign or dispose of property or rights in action, or some part thereof, with the intent to defraud creditors;

(7) that ..he.. ha.. converted, or about to convert property into money or evidences of debt, with intent to place it beyond the reach of creditors;

(8) that ..he.. fraudulently contracted the debt or incurred the obligation for which suit has been or is about to be brought;

(9) that ..he.. buying, selling, or dealing in, or ha.. within six months next before this suing out of attachment, directly or indirectly bought, sold, or dealt in future contracts commonly called "futures";

(10) That ..he.. in default for public money, due from as principal., to the state, or some county, city, town, or village thereof;

(11) that defendant is a banker, banking company, or corporation, and received deposits of money, knowing at the time he or it was insolvent; or has made or published a false or fraudulent statement as to his or its financial condition; and bond and security having been given according to the statute,

We therefore command you, that you attach the said by estate, real and personal, in your county, to

the value of the said demand and costs of suit, and that you safely keep the same according to law, so as to compel the said to appear before the circuit court, to be held at, in and for the county of, district, on the Monday of, 19.., to answer the above complaint; and that you summon the said if to be found in your county, to appear and answer accordingly.

And the above named attaching creditor.. having made the proper suggestion for writ of garnishment against of your county:

We therefore command you to summon said to appear in said court of the county of, district, in the state aforesaid, at on the day of, 19.., then and there to answer on oath, in writing: 1, Whether ..he.. be indebted to said defendant.. or were so indebted at the time of the service of this writ on or have at any time since been so indebted;and, if so indebted, in what sum, whether due or not, and when due or to become due and how the debt is evidenced, and what interest it bears; 2, What effects of the said defendant ..he.. ha.., or had at the time of the service of this writ on or ha.. had since, in possession or under control; 3, Whether ..he.. know.. or believe.. that any other person.. indebted to the said defendant..; and, if so, who, and in what amount, and where ..he.. reside..; 4, Whether ..he.. know.. or believe.. that any other person.. ha.. effects of the said defendant in possession or under control; and, if so, who, and where ..he.. reside..;

And have you then and there this writ, with your proceedings indorsed thereon.

Witness my signature and official seal, this, etc.

.....
Circuit clerk, county, Mississippi,
District

By D. C.

| | |
|--|--|
| No. | |
| Circuit court. | |
| district. | |
| | |
| v.: Writ of attachment and garnishment. | |
| | |
| Issued 19.., at | |
| o'clock .. M. | |
| By Clerk. | |
| D. C. | |
| Returnable 19.. | |
| Received this the .. day of | |
| 19.., at o'clock .. M. | |
| county, Miss. | |
| | |
| Returned and filed this the.... | |
| day of 19.. | |
| | |
| Fees of | |
| Levying \$ | |
| Entering writ | |
| Returning writ | |
| Total \$ | |

2735 Virginia

The commonwealth of Virginia,

To the sheriff of the county of, greeting:

Whereas, since the institution of a suit in our circuit court of the county of, brought by against to recover dollars and cents, with interest thereon, there has been filed in the clerk's office of our said court, an affidavit that the claim of the plaintiff.. asserted in the said suit is believed to be just, that the affiant believes the plaintiff.. entitled to, or ought to recover, (at the least) the sum of dollars, and cents, with interest thereon, from the day of, 19.., until paid, and that the affiant believes that the defendant is a foreign corporation, or is not a resident of this state, and has estate or debts owing to said defendant within the, or is sued with a defendant residing therein; or, that the defendant.., being a nonresident of this state, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the; or is removing, or about to remove, out of this state, with intent to change his domicile; or is removing, intends to remove, or has removed the specific property sued for, or his own estate, or the proceeds of the sale of his property or a material part of such estate or proceeds, out of this state, so that process of execution on a judgment when obtained in said action will be unavailing; or, is converting, or is about to convert, or has converted, his property of whatever kind, or some part thereof into money, securities or evidences of debt with intent to hinder, delay or defraud his creditors; or, has assigned or disposed of, or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay or default his creditors.

Therefore we command you that you attach the estate of the said for the amount of, and such estate, so attached, in your hands to secure, or so to provide, that the same may be forthcoming and liable to further proceedings thereupon to be had at the rules to be held in the clerk's office of our said court on the Monday in, 19.., and that you make return hereof, at the said rules of our said court. And have then there this writ.

Witness, clerk of our said court, at the court house, the day of, 19.., and in the year of the commonwealth.

.....
.....

I hereby designate the following named parties, as being indebted to or having in possession effects of the defend-

ants or one of the defendants namely:, and the sheriff is directed to serve a copy of the attachment on the said parties so designated.

.....

| | |
|---|--|
| <p>.....</p> <p style="text-align: center;">{ Attachment to</p> <p style="text-align: center;">v. Rules, 19...</p> <p>.....</p> <p>.....</p> | <p style="text-align: right;">p. q.</p> <p>.....</p> <p>Serve on</p> <p>.....</p> <p>who are required to appear at the rules to be held in the clerk's office of the circuit court of the county of</p> <p>..... on the Monday in 19.., and disclose on oath in what sum he indebted to the defendant.., and what effects of the defendant.. he.. ha.. in ..he.. hands.</p> <p style="text-align: right;">Teste:</p> |
|---|--|

Return

Executed this day of, by serving a true copy of the within attachment on, and attaching the following property, to wit: (Describe property).
, appointed to watch the property.

..... D. S.
 For Sheriff.

2736 West Virginia

(Caption)

The plaintiff in this cause having filed affidavit as required by law, the sheriff of the county of, or a constable of any district therein to whom this order may come, is hereby required, in the name of the state of West Virginia, to attach, the estate of the defendant, sufficient to pay the sum of \$..... (the amount affiant states the plaintiff justly entitled to recover), and the costs of this suit, and make return of his proceedings under this order to the next term of the circuit court for the county of, at rules to be held in the clerk's office of said court, on the Monday in, next.

Witness,, clerk of said court, this day of, 19...

..... Clerk.

..... designate of county, state of West Virginia, as person.. indebted to or having in possession the effects of defendant to the above named suit.

....., 19...

..... Attorney.. for plaintiff.

The above designated person, in the name of the state of West Virginia, required to appear before the judge of the circuit court for county, in the state of West Virginia, at the court house of said county, on the day of term, 19.., and disclose on oath in what sum indebted to the defendant and what effects of the said defendant in hands.

Given under my hand this day of, 19...
 Clerk circuit court.

Return

By virtue of the within writ I attached and took into my possession at o'clock . . . M. on the day of, 19.., in county, certain property of the within named defendant, that is to say (Describe the property attached) then being at of; and also at o'clock . . . M. on the said day of, in said county, I attached and took into my possession certain other property of the within named defendant, that is to say (Describe the same). This car load was at the time of the said attachment in the possession of the railroad company which refused to deliver up possession thereof until the freight on the same, amounting to dollars, had been paid thereupon; at the request of the within named plaintiffs and with money furnished to me for the purpose by them, I paid the said freight, amounting to dollars, to the said railroad company. The said property so attached as aforesaid is held by me subject to the further order of the court.

. D. S.
 For S. O. C.

SECOND WRIT

2737 Illinois

A plaintiff may cause to be issued a second attachment writ to another county at any time before judgment, without waiting for the return of the first writ.⁵¹

ALIAS WRIT

2738 Illinois

No authority exists in Illinois for the issuance of an *alias* writ of attachment. But the original writ may be disregarded upon the filing of new affidavit and the issuance of a new writ thereon.⁵²

⁵¹ Morris v. School Trustees, 15 Ill. 268, 269.

⁵² Buck v. Coy, 73 Ill. App. 162.

PUBLICATION

2739 Affidavit of nonresidence (D. C.)

(Caption)

I,, on oath say that I am the plaintiff in the above entitled cause and that the defendant at the time of the bringing of this suit was and still is a non-resident of the District of Columbia.

Subscribed, etc.

2740 Notice, commencement and termination

Under Illinois practice, the publication of a notice of the pendency of an attachment may commence before the term of the court has begun and it may conclude after the commencement of such term.⁵³

2741 Notice (Ill.)

(Caption)

Public notice is hereby given to the said that a writ of attachment issued out of the office of the clerk of the circuit court of county, dated the day of, 19.., at the suit of the said above named plaintiff.. and against the lands, goods, chattels, rights, moneys, credits and effects of the said defendant for the sum of dollars and cents, directed to the sheriff of county to execute.

Now, therefore, unless you, the said defendant shall personally be and appear before the said circuit court of county, on or before the first day of the next term thereof, to be holden at the court house, in the city of, on the Monday of, 19.., give bail and plead to the plaintiff's action, judgment will be rendered against you and in favor of the said plaintiff.. and so much of the lands, goods, chattels, rights, moneys, credits and effects attached as may be sufficient to satisfy the said judgment and costs, will be sold to satisfy the same.

..... Clerk
..... Attorney.

2742 Certificate of publication, requisites

A certificate of publication made by a secretary of a publishing corporation should recite that he is the secretary of the

⁵³ Lawver v. Langhans, 85 Ill. 141; Sec. 22, Attachment act (Hurd's Stat. 1909, p. 195).

corporation and that he was duly authorized to make the certificate.⁵⁴

DECLARATION

2743 Filing

The plaintiff, in attachment, under Illinois practice, may file the declaration on the first day of the term, or upon any succeeding day thereof, regardless of the Practice act. If the declaration is not filed at the term of the court to which it is made returnable the attachment may be dismissed.⁵⁵

In Michigan, the same rules and practice which govern the filing of declarations in assumpsit control the filing of declarations in attachment.⁵⁶

2744 Amendment

Under Illinois practice, a plaintiff, by proper leave of court, may change the form of action in an attachment proceeding.⁵⁷

APPEARANCE

2745 Special, res

A defendant may limit his appearance in an attachment proceeding to a motion to quash the writ of attachment, and thereby avoid submitting himself to the court's jurisdiction.⁵⁸ A special appearance may be entered to question the jurisdiction over the *res* alone.⁵⁹

2746 Constructive, scope

In the absence of service of process, a defendant will not be subjected to a personal judgment in an attachment proceeding on a mere constructive appearance.⁶⁰

⁵⁴ Pine Tree Lumber Co. v. Central Stock & Grain Exchange, 238 Ill. 449, 455 (1909).

⁵⁵ Kirk v. Elmer Agency, 171 Ill. 207, 214 (1898); Lawver v. Langhans, 85 Ill. 141; Sec. 25, Attachment act (Hurd's Stat. 1909, p. 195).

⁵⁶ (10,574) C. L. 1897 as amended in 1907.

⁵⁷ May v. Disconto Gesellschaft, 211 Ill. 316.

⁵⁸ Johnson v. Buell, 26 Ill. 67 (1861).

⁵⁹ Pack, Woods & Co. v. American Trust & Savings Bank, 172 Ill. 192, 195 (1898).

⁶⁰ Inman v. Allport, 65 Ill. 543.

ABATEMENT

2747 Death of defendant

The death of the defendant in attachment does not abate the suit, which may properly be continued against his administrator.⁶¹

2748 Waiver

The right to plead in abatement to an attachment writ is waived by interposing an insufficient motion,⁶² or by giving bond to pay the debt and the damages and an order dissolving the attachment and releasing the lien upon the property attached.⁶³ The want of proper service upon a corporation can only be raised by plea in abatement filed at the earliest opportunity; such a plea comes too late after the making of a motion which seeks the same object.⁶⁴

2749 Plea, nature and scope, practice

A plea which traverses the allegations of the affidavit in attachment is a plea in abatement having the same object and office as pleas in abatement have at common law.⁶⁵ The issue made on a plea in abatement and the issue made upon a plea to the merits are separate and distinct issues, the one is not waived by the other, and, under Illinois practice, they are to be submitted to the same jury.

2750 Plea requisites; traverse, time

In traversing an affidavit the causes of attachment must be denied as of the date of the making of the affidavit or of the commencement of the suit by the filing of the affidavit.⁶⁶ Averments of denials in the present tense do not amount to such a traverse.⁶⁷

⁶¹ *Keith v. Ray*, 231 Ill. 213, 215 (1907).

⁶² *Union National Bank v. First National Bank*, 90 Ill. 56, 59 (1878); *Holloway v. Freeman*, 22 Ill. 197, 202 (1859).

⁶³ *Hill v. Harding*, 93 Ill. 77, 81 (1879); See. 15, c. 11, Hurd's Stat. 1909, p. 194.

⁶⁴ *Union National Bank v. First National Bank*, 90 Ill. 56.

⁶⁵ *Boggs v. Bindskoff*, 23 Ill. 67.

⁶⁶ *McFarland v. Claypool*, 128 Ill. 397, 401 (1889).

⁶⁷ *McFarland v. Claypool*, *supra*.

2751 Plea requisites; foreign corporation

A foreign corporation which seeks to defeat an attachment on the ground that it had, and has, a sufficient amount of personal property in the county with which to satisfy the plaintiff's claim, must aver these facts in its plea in abatement to the affidavit and writ of attachment.⁶⁸

2752 Plea (Ill.)

(Caption)

And the, defendant in this suit, by, his attorney, comes and defends the wrong and injury, when, etc., and prays judgment of the writ of attachment of the plaintiff in this suit, and that the same may be quashed, because he says that he, the said defendant, at the time of the commencement of this suit, and the issuing out of said writ of attachment by the said plaintiff, and the making and filing of the affidavit in this suit for said writ of attachment, was not about to remove his personal property from this state to the injury of said plaintiff; and this he prays may be inquired of by the county, etc.

.....
Defendant's attorney.

(Venue)

....., the above named defendant, being first duly sworn, on his oath says that the above plea is true in substance and in fact.

Subscribed, etc.⁶⁹

b

And the defendant..,, by, ..h.. attorney.., come.. and defend.., etc., and pray.. judgment of the said writ of attachment and that the same may be quashed, because ..he.. say.. that at the time of the making said affidavit for attachment in this cause and at the date of the issuing of the writ of attachment in this cause, ..he.. w.. not about to depart from this state with the intention of having ..h.. effects removed from this state, and at said time ..h.. was not about to remove ..h.. property from this state to the injury of said and ..h.. creditors, and had not within two years last past prior to the making of said affidavit and the date of said writ of attachment fraudulently conveyed or assigned ..h.. effects or a part thereof so as to

⁶⁸ Mineral Point R. Co. v. Keep, 22 Ill. 18.

⁶⁹ Cook v. Yarwood, 41 Ill. 115, 116 (1866).

hinder and delay . . h . . creditors, and at the date of the making of said affidavit and issuing of said writ, . . he . . had not within two years last past prior to such time, fraudulently concealed or disposed of . . h . . property so as to hinder and delay . . h . . creditors, and at the date of the making of said affidavit and issuing of said writ of attachment . . h . . w . . not about fraudulently to conceal, assign or otherwise dispose of . . h . . property or effects so as to hinder or delay . . h . . creditors, as in and by said affidavit are alleged against the said defendant . . ; and of this the defendant . . put . . sel . . upon the country. Wherefore . . h . . pray . . judgment that said writ may be quashed, etc.

.....
Attorney for

(Verification)

2753 Motion to quash (Md.)

(Caption)

And, the defendant in the above entitled cause, appearing specially for the purpose of moving to quash the attachment and not generally or for any other purpose, by, his attorneys, moves the court to quash the attachment in this case for the following reasons:

1. Because there is no sufficient affidavit filed.
2. Because said account filed is insufficient.
3. Because no sufficient short note was filed with the attachment.
4. Because no writ of summons was issued against the defendant and no copy of the writ was set up at the court house door.
5. Because the alleged indebtedness for which said writ of attachment was issued is unliquidated damages and the damages for the alleged cause of action sued on are unliquidated; and because the declaration is insufficient, is not verified and no bond has been filed as required by law.
6. Because the claim sued on is not a liquidated claim as is required to be in such a proceeding as this.
7. And for other reasons apparent on the face of the proceeding.

.....
Attorney for defendant.

2754 Verdict, requisites

If a jury finds a plea in abatement untrue, they should assess the plaintiff's damages, or if no damages are proved, they should assess nominal damages. It is improper to merely find the issues for the plaintiff.⁷⁰

⁷⁰ Boggs v. Bindskoff, *supra*.

PROCEEDINGS TO DISSOLVE

2755 Application, waiver

Proceedings to dissolve an attachment, under Michigan practice, may be had before a circuit court commissioner at any time before judgment; an appearance to the writ is not regarded as a waiver of the right to so proceed.⁷¹

2756 Application (Mich.)

To

Circuit court commissioner of county, Michigan.

The application of, the defendant above named, respectfully shows that the said and on the day of, 19.., sued out of the circuit court for the county of a writ of attachment tested on that day against the goods and chattels, lands and tenements of the said, to which said writ made and annexed thereto the affidavit of the said, stating therein that the said was at the date thereof indebted to the said and in the sum of dollars as near as the deponent could estimate the same, over and above all legal set-offs, and that the same was due upon an express contract, and that the said deponent had good reason to believe that the said had assigned, disposed or concealed some of his property with intent to defraud his creditors, and that deponent had also good reason to believe that the said was about to assign, dispose of, or conceal some of his property with intent to defraud creditors, and that said indebtedness was then due. That by virtue of said writ of attachment, sheriff of said county of, seized on day of, 19.. (Describe property levied upon), as appears from the return of said sheriff endorsed upon said writ.

And the said further shows that the said property above described is the property of the said and that he applies for an order dissolving said attachment and that the said property be restored to the said for the reasons following:

1. That the affidavit aforesaid being in the disjunctive was entirely insufficient and did not give the court jurisdiction or authority to issue said writ.
2. That the said affidavit is defective and does not comply with the statute in such case made and provided.
3. That the said has not disposed of or concealed any of his property with intent to defraud his creditors.

⁷¹ Hyde v. Nelson, 11 Mich, 353 (1863).

4. That the said is not and was not at the time said affidavit was made about to assign, dispose of, or conceal any of his property with intent to defraud his creditors.

(Verification)

2757 Citation (Mich.)

(Caption)

On reading the application of, the above named defendant, duly verified and praying that the attachment in this cause may be dissolved and that the property seized by virtue thereof be restored to the said defendant for reasons in said application set forth, it is ordered that the said plaintiffs be and they are hereby cited and required to show cause on the day of next at o'clock in thenoon, before me at my office in the city of, in said county, why said attachment should not be dissolved and the property aforesaid restored to the said defendant.

Witness my hand at the city of this day of, 19..

.....
 Circuit court commissioner for county, Michigan.

2758 Order dissolving (Mich.)

(Caption)

Application in writing having been made to me by, the above named defendant, on the day of, 19.., for a dissolution of the attachment issued in this cause at the suit of the above named plaintiffs, and a citation having been issued by me on the same day requiring the said plaintiffs to show cause before me at my office in the city of, in said county of, on the day of, 19.., at o'clock in thenoon, why the said writ of attachment should not be dissolved and the property seized by virtue thereof be restored to the defendant in said attachment, and the said citation having been returned to me with proof of due service thereof upon the said plaintiffs' attorneys more than days before the return day thereof, and the said parties having appeared before me on the day and year last aforesaid at my office aforesaid, after hearing the proofs and allegations of the parties and being satisfied that the said plaintiffs have not a good and legal cause for suing out said writ, it is therefore ordered that the said attachment be and the same is hereby dissolved and that the property seized by virtue thereof be restored to the said, the defendant herein; and it is further ordered

that the said plaintiffs pay to the said defendant his cost of the proceeding so had before me to be taxed, and that the said defendant have execution therefor.

Dated, etc.

.....
Circuit court commissioner, etc.

RELEASE OF PROPERTY

2759 Forthcoming bond, nature and scope

A forthcoming bond given under section 14 of the Attachment act is to be substituted for the attached property without making the obligors liable for the debt of the principal obligor. If a judgment is rendered quashing the attachment, or a judgment is rendered on the attachment issues for the defendant, the lien created by the levy is thereby vacated and relieves the obligors of all obligation or duty to return the property to the obligee in the bond.⁷²

2760 Forthcoming bond (Md.)

Know all men by these presents, that company as principals and, a corporation under the laws of the state of, as surety, are held and firmly bound unto company in the full and just sum of dollars (\$....), current money, to be paid to the said company, attorneys, executors, administrators or assigns, to which payment well and truly to be made and done, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this day of, 19..

Whereas, the said company has sued out of the circuit court for county, Maryland, an attachment against the lands and tenements, goods, chattels, rights and credits of a certain company, to the value of dollars and cents.

And whereas, the sheriff of county, Maryland, has attached the goods and chattels, rights and credits of the said company, as by the return to the writ will appear.

And whereas, the said company is desirous to dissolve said attachment on giving bond with surety, according to the act of assembly in such case made and provided.

Now, the condition of the above obligation is such, that if

⁷² Gilbert v. Yunk, 214 Ill. 237, 241 (1905).

the said company shall satisfy any judgment that shall be recovered in said case against them, then the said obligation shall be void; else to be and remain in full force and virtue in law.

(Signatures and seals)

Witness:

.....

(Mississippi)

⁷³ The condition of the above obligation is such, that whereas on the day of, 19.., the said sued out an attachment in the circuit court of said county against the obligors herein for the sum of dollars, returnable to the term, 19.., of the said circuit court and levied the writ by garnisheeing the of Mississippi; and whereas, said obligors are desirous of executing a bond to discharge said attachment and release the garnishee, and to collect the money in the hands of said garnishee:

Now, therefore, if the said obligors shall pay and satisfy any judgment that may be recovered by the plaintiff in the suit, with all costs, then this obligation be void; otherwise to remain in full force and effect.

Witness, etc.

Filed and approved (by clerk).

2761 Order (Ill.)

(Caption)

And now comes the defendant in his own proper person, and by, his attorney, and, of, also comes by, its resident assistant secretary, and by, its attorney, and due notice of this motion having been given to the plaintiffs, the said, as principal, and the and surety, do enter into this recognizance now taken in open court and entered of record, conditioned that the said will pay the plaintiffs the amount of the judgment and costs which may be rendered against him in this suit on a final trial, within days after such judgment shall be rendered, and that upon a forfeiture of such recognizance judgment may be rendered and execution issued as in other cases of recognizance, and this court approving of the security;

It is therefore ordered that the attachment herein be and the same hereby is dissolved and that any property taken or garnisheed be restored and that all previous proceedings

⁷³ Add usual obligation.

against the sheriff or the garnishees be and the same hereby are set aside and that the cause shall proceed as if the defendant had been seasonably served with a writ of summons.

STAY OF PROCEEDINGS

2762 Bankruptcy proceeding pending, practice

The defendant may obtain a stay of an attachment proceeding on account of his bankruptcy before securing a discharge, whether the attachment is brought within four months of the bankruptcy proceeding or prior thereto.⁷⁴ The stay should continue until the question of discharge is determined in the bankruptcy court. If a discharge is refused, the plaintiff in the suspended action may proceed to judgment. If the discharge is granted, the court in which the suit is pending may render judgment and award a special execution to enforce an attachment which was levied four months before the commencement of the bankruptcy proceeding, or to charge the sureties upon the bond that was given to dissolve the attachment.⁷⁵

SPECIAL SALE (FLORIDA)

2763 Petition

(Caption)

To the clerk of said court:

Your petitioner, the plaintiff in the above entitled cause, respectfully represents that under and by virtue of a writ of attachment, issued out of said court in said cause on the day of, 19.., the sheriff of said county attached and took into custody, the following described personal property, to wit:, the same being the property of said defendant; that the value of said is approximately dollars; that the cost of keeping the said by sheriff is per day; and that the cost of keeping said is accordingly disproportionate to the value thereof.

Thereupon, your petitioner respectfully prays that it may be ordered by you that said be sold at public outcry before the county court house door in, of, to the highest bidder for cash on the day of, 19.., during the legal hours of sale; and that the notice of such

⁷⁴ Hill v. Harding, 107 U. S. 631 (1882), overruling Hill v. Harding, 93 Ill. 77, 83 (1879); 1 Federal Stats. Ann., p. 563, sec. 11a.

⁷⁵ Hill v. Harding, 107 U. S. 633; 116 U. S. 97; 130 U. S. 702.

sale be published once a week for two weeks immediately preceding the day of such sale in a newspaper published in said county of; and that said sheriff do pay into said court the proceeds of such a sale to abide the judgment thereof.

And your petitioner will ever pray.

.....
Petitioner.
By, his attorney.

(Verification)

2764 Notice

To, defendant:

You are hereby notified that the foregoing petition will be presented to the clerk of said court at his office in, of, Florida, on the day of, 19.., at o'clock.

.....
Plaintiff's attorney.

Served the foregoing petition and notice this day of, upon, by delivering a true copy thereof to, secretary of said company, in county, Florida, the president and vice-president of said company being absent from said county.

....., Sheriff.
By, D. S.

2765 Order

(Caption)

Upon reading and considering the petition of the plaintiff for the sale of the personal property hereinafter described, it is ordered that the sheriff of said county do sell at public outcry before the county court house door in the of, in said county, to the highest bidder for cash, on the day of, 19.., during the legal hours of sale, the following described personal property, to wit:, the same being the property of said defendant and not in the custody of said sheriff, and that a notice of such sale be published once a week for two successive weeks, immediately preceding the day of such sale in a newspaper published in said county; and that the said sheriff do pay into said court the proceeds of such sale to abide the judgment thereof.

Done and ordered this day of, 19..

(Official seal)

.....
Clerk of said court.

2766 Certificate of proceedings

(Caption)

I,, clerk of said court, do hereby certify that the sheriff of said county has paid into said court the sum of dollars as the proceeds of the sale of a certain attached and taken into custody by said sheriff under and by virtue of a writ of attachment issued out of said court in the above styled cause on the day of, 19.., and sold by said sheriff by virtue of an order of sale made by me in said cause on the day of, 19..

Witness, etc.

(Official seal)

.....
Clerk of said court.

DISTRIBUTION

2767 Petition

To the honorable, judge of said court:

Your petitioner, the plaintiff in the above entitled cause, by, its attorney, respectfully represents unto your honor, that under and by virtue of a writ of attachment issued out of said court on the day of, 19..,, the sheriff of said county, attached and took into custody as the property of said defendant, and that the said sheriff under and by virtue of an order of sale made by the clerk of said court on the day of, 19.., sold said at public outcry on day of, 19.., in accordance with the terms of said order, and deposited the proceeds of sale thereof in said court, the same being dollars.

Your petitioner further alleges that on day of, 19.., a final judgment was entered against the defendant in favor of the plaintiff for dollars cents damages, and dollars and cents costs of suit; and that on the same day execution was issued on said judgment by the clerk of said court and delivered to said sheriff.

Your petitioner, therefore, prays that the clerk of said court be ordered to pay out of the proceeds of the sale, first, the cost of this suit, including the commissions allowed by law to the sheriff on money collected under process, and the balance of such proceeds to the said plaintiff.

And your petitioner will ever pray, etc.

.....
Plaintiff's attorney.

2768 Order

(Caption)

This cause coming on to be heard upon the petition of plaintiff for the disbursement of the proceeds of sale of a certain, taken under and by virtue of a writ of attachment issued in said cause, the clerk of the said court is hereby ordered, first to pay out of the proceeds of said sale, the costs of this suit including commissions allowed by law to the sheriff on money collected under process, and the balance of such proceeds to the said plaintiff.

Done, etc.

....., Circuit Judge.

INTERPLEADING

2769 Nature and scope

The only right assertable and triable in an attachment proceeding under an interplea filed by virtue of the statute is the right of ownership of the property attached. A simple contractor cannot have his right as such determined in an attachment suit.⁷⁶ The issue made upon an interplea is solely between the claimant and the plaintiff in the attachment; it is one which neither the defendant in the attachment nor the garnishee has anything to do.⁷⁷ The interplea provided by statute differs from a bill of interpleader of a court of chancery and an interpleader at common law.⁷⁸

2770 Proof, prima facie case

Upon an interplea in an attachment proceeding the claimant establishes a *prima facie* case by proving the execution of a bill of sale and the taking of possession of the property thereunder.⁷⁹

2771 Pleading, time

An interplea is filed in apt time if it is interposed after the rendition of judgment against the defendant in attachment, but at the same time at which the judgment is rendered.⁸⁰

⁷⁶ May v. Disconto Gesellschaft, 211 Ill. 316, 317; Sec. 29, c. 11, Hurd's Stat. 1903.

⁷⁷ Springer v. Bigford, 160 Ill. 495, 498 (1896); Juilliard & Co. v. May, 130 Ill. 87, 95 (1889); City Ins. Co. v. Commercial Bank, 68 Ill. 348, 352 (1873).

⁷⁸ Juilliard & Co. v. May, 130 Ill.

92, 93; City Ins. Co. v. Commercial Bank, 68 Ill. 351; Juilliard & Co. v. May, 130 Ill. 94, 95.

⁷⁹ Springer v. Bigford, 160 Ill. 498.

⁸⁰ Springer v. Bigford, 160 Ill. 499; Juilliard & Co. v. May, 130 Ill. 95.

2772 Interplea, general (Ill.)

(Venue)

In the court of county,
 To the term, 19..

| | | |
|-----|---|--------------|
| A B | } | Attachment |
| v. | | |
| C D | } | Interpleader |
| | | |

The petition of E respectfully represents that, on, to wit, the day of, 19.., one A B commenced an action of attachment in this honorable court, against C D, and that thereupon a writ of attachment issued out of this court against the said C D, and W was made a garnishee in said cause.

Your petitioner further shows that the said W having been served as garnishee, appeared and put in his answer thereto, whereby he claimed to have in his custody and charge (Give description) of and belonging to the defendant, the said C D.

Your petitioner further shows that, on, to wit, the day of, 19.., the said C D sold and delivered the said (Give description) to your petitioner, for a valuable consideration, and that thereupon your petitioner took possession of the said (Give description), so on exhibition as aforesaid, and has had possession of the same from thence hitherto, subject, however, to the right of exhibition of the said W as aforesaid.

Your petitioner therefore asks leave to appear and assert his claim to said goods, according to the form of the statute in such cases made and provided.

E.

State of Illinois, }
 county. } ss.

The foregoing petition was subscribed and sworn to before me by the said E, petitioner, the day of, 19..

.....
 Notary Public.

2773 Interplea, assignee for benefit of creditors (short) Illinois

(Caption)

And now comes C, by S, his attorney, and by leave of court, interpleads herein, according to the form of the statute in such case made and provided, and says that the defendant, C D, on the day of, 19.., in the county and state aforesaid, doing business and residing in the city of, in said county and state, and being unable to pay his debts, and being insolvent, executed and delivered to him, the said C, a certain deed of assignment of all

said C D's property, of every kind, name and nature, real, personal and mixed, on the date last mentioned, which said deed was duly made, executed and acknowledged under and in conformity with the laws of the state of regarding voluntary assignments by debtors for the benefit of creditors, and was, on said date last mentioned, first duly filed for record in the recorder's office of county, in said state, and afterwards, and on said day, duly filed in the county court of said county, and the said C was, by reason thereof, and having on said day duly filed his bond as such assignee with the clerk of said county court (such bond being duly approved by said clerk), made assignee of said debtor and of all his property of every kind, and the title thereto wholly vested in him, said C; and said C further interpleading, as aforesaid, says that the said C D was not at the time of the filing of the said affidavit for attachment herein about fraudulently to sell, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors, and further says that the said goods, chattels, credits and effects attached and seized by virtue of the said writ of attachment in this behalf, were, at the time of said seizure and at the time of the execution of said deed of assignment, the property of said C D, and, by virtue of the said execution, delivery, recording, and filing of said deed of assignment, became and were, and still are, the property of him, the said C, assignee as aforesaid; and this the said C is ready to verify; wherefore he prays judgment if his goods, chattels, rights, credits, and effects ought to be detained by virtue of said writ, etc.

C, Assignee.

....., Attorney for interpleader.
(Verification)

Replication

And said plaintiff for replication to the interplea herein of C, assignee, says that the said C D, defendant, was, at the time of the filing of the said affidavit for attachment, about fraudulently to sell, assign or otherwise dispose of his property or effects so as to hinder or delay his creditors, and that said goods, chattels, credits and effects attached and seized by virtue of the said writ of attachment, did not by virtue of the said execution, delivery, recording and filing of said deed of assignment, become and remain the property of the said C, assignee, interpleader herein; and this the plaintiff prays may be inquired of by the county.

By, its attorney.

2774 Interplea, assignee for benefit of creditors (full) Illinois

(Caption)

Now comes, a citizen of the state of, by, his attorney, and interpleads herein according to the form of the statute in such cases made and provided, and says that on the day of, 19.., the above named defendants, being co-partners in trade under the firm name of and residing and doing business in the city of and state of, were insolvent and unable to pay their co-partnership and individual debts; and being so insolvent they then executed and delivered to him, the said, their certain deed of assignment of the date last mentioned. That said deed was made, executed and acknowledged under and in conformity to the laws of the state of relative to general assignments by debtors for the benefit of their creditors, and recited and provided substantially as follows: that said defendants, grantors in said deed, were justly indebted to sundry persons in diverse sums of money, and being unable to pay the same in full, were desirous of making an equitable distribution of their property and effects among their creditors, and providing for the payment of the same so far as in their power by assignment of all of their property for that purpose; that therefore the said grantors in consideration of the premises and of the sum of one dollar did grant, bargain, alien, sell and assign, convey, transfer, set over and deliver unto the said, his successors and assigns all and singular, their co-partnership and individual estate, real and personal, goods, chattels, effects, choses in action and property of every name and kind, whether held by and in the name of said parties of the first part, and each or either of them, or by and in the name of any person for them or either of them, or by or in the firm name of, except such property, if any, held or owned by parties of the first part, separately and individually, as was exempt by law from levy and sale under execution, in trust for the following uses and purposes; first, to take possession of and convert the same into money; second, out of the proceeds thereof to pay the expenses of executing said assignment, including the compensation authorized by law to be paid to said assignee; third, out of the net proceeds of the separate and individual property of each of said parties of the first part to pay in full his separate and individual debts and liabilities, if possible, and if such proceeds should be inadequate thereto, then to apply the same pro rata to the payment of such debts and liabilities, and in case such proceeds should be more than sufficient to pay the same in full, to apply the surplus toward the payment of the co-partnership debts and liabilities of said parties of the first part; fourth, to use the net proceeds of the co-partnership property, together with the surplus, if any, of the proceeds of

the individual property of said parties of the first part in payment in full of the co-partnership debts and liabilities of said parties, and if insufficient for such full payment, then to apply the same pro rata to the payment of said co-partnership debts and liabilities; providing, however, that if the proceeds of the co-partnership property should not be sufficient for payment in full of said co-partnership debts, then the same should be applied, first, to the payment of the employees of said parties of the first part whose names, with the amounts due to each of them, were annexed to said deed in schedule marked exhibit "A" and made a part thereof; second, to pay the sundry persons therein named divers sums of money in said deed specified; and in case any surplus should remain of the property and estate thereby assigned, after payment of all just debts and liabilities of said parties of the first part, then to return such surplus to said parties of the first part according to their respective rights thereto. And it was further in and by said deed provided that the said did accept the trust thereby created and reposed in him and that he covenanted and agreed to execute the same. That the said joined in the execution and acknowledgment of the said deed with said parties of the first part as aforesaid. All of which will more fully appear by a copy of said deed hereto attached as exhibit "1," or by reference to said original or to a duly certified copy to be presented upon the trial hereof.

And the said further says that the said deed of assignment on the day of the date thereof was duly recorded in the office of the clerk of the county of in said state of and clerk of the supreme court of said state for said county as required by the said laws of; that the said accepted said assignment as provided by said laws and took possession of the property therein described so far as possible, and proceeded and still continues to apply the same according to the terms and provisions of said deed of assignment and in pursuance of said laws of the state of; and that the entire property so assigned and conveyed was at the time of the making of such assignment and still is inadequate to the payment of the debts of said defendants charged thereon.

And the said interpleading further states that the said deed of assignment was recorded in the recorder's office of county in the state of Illinois on the day of, 19.., in book of records at page; that plaintiff herein had actual notice of said deed of assignment, and of the terms and provisions thereof prior to the commencement of this suit; and that all interest of defendants and each of them and of the said, as assignee aforesaid, in the lands levied upon by the writ of attachment herein, and in the debts and personal property garnisheed or attached herein which existed at

the time of the commencement of this suit, was at the time of the execution of said deed of assignment vested in said defendants or some of them and was included and covered in and by the description in said deed of the property and estate thereby conveyed and transferred, and did by the operation of said deed at the time of execution and delivery thereof pass to and vest in said, as assignee aforesaid, and is still the estate of, assignee aforesaid, and subject to the trust in and by said deed of assignment created.

And the said interpleading further states that all of said plaintiffs and defendants in attachment were at the time of said assignment and still are residents of the state of

Wherefore, the said interpleading as aforesaid says that the goods, chattels, credits and effects attached and seized, and the real property levied upon by virtue of the writ of attachment issued herein were at the time of such attachment and levy and still are the property of the said, as assignee aforesaid, and not subject to attachment herein; and this he is ready to verify. He therefore, prays judgment if the said goods, chattels, credits, and effects ought to be detained, or further proceedings to be had against said real property by virtue of such writ herein.

By
 By, his attorney.

(Venue)

..... of, being duly sworn on oath states that he is the attorney of the interpleading claimant; that he has read the foregoing interplea and is familiar with the matters herein stated; and that he believes the same are true in substance and in fact as herein stated.

Subscribed, etc.

2775 Petition (W. Va.)

(Caption)

To the honorable, one of the judges of the circuit court of county, in the state of West Virginia:

Your petitioner, the of, a corporation created under the authority of the laws of the United States, and existing at, in the state of, respectfully represents and shows that under and by virtue of the attachment issued in the above entitled action, certain property, to wit, (Describe same) has been levied on, taken from the possession of the, and is now held by the sheriff of the said county of and that

your petitioner has such a claim to and interest in said property as entitles it to have the same released from such levy; that heretofore, to wit, on the day of, 19.., in consideration of the sum of dollars, then paid by your petitioner to the above named defendant said defendant made and delivered to your petitioner its bill of exchange, or draft, for said sum drawn upon the above named plaintiffs, payable at sight to the order of your petitioner, and at the same time endorsed and delivered to your petitioner a bill of lading for said property, issued by the railroad company, in favor of the order of said; that your petitioner became on said day of, 19.., and before the levying of said attachment and ever since said date has been and now is the owner in good faith and for a valuable consideration of said property and of said bill of exchange and bill of lading, and is entitled to the possession of the said property.

Your petitioner prays that such orders may be made as shall be necessary to protect its rights.

By....., its attorney.

2776 Order

(Caption)

This day of, 19.., came, by their attorneys, the plaintiffs and the of, which has filed its petition stating a claim to and interest in bags of levied on under the order of attachment issued in this cause, which are described in the sheriff's return to said order of attachment as one car load of, being at the time of the attachment in the possession of the company, and the claim of the said being still undetermined, it is ordered, with the consent of the plaintiffs and of said claimant, by their attorneys, that the sheriff of county, do sell, in the manner in which sales under executions are by law directed to be made, the said claimed by the bank as aforesaid, and that he hold the proceeds of such sale as the property itself would have been held, if unsold, until the further order of this court, and all questions as to the title to and ownership of the property hereby directed to be sold are reserved.

2777 Replication, necessity

An unanswered interplea will be taken as true.⁸¹

⁸¹ Williams v. Vanmetre, 19 Ill. 294.

2778 Replication, commencement

And for (a further) replication in this behalf, (by leave of court first had and obtained), plaintiff.. say.. that ..he.. ought not by reason of anything in said interplea of alleged, to be barred from having and maintaining ..h.. afore-said writ of attachment against said property in said interplea mentioned, because, ..he.. say..,

Conclusion

Wherefore ..he.. pray.. judgment and ..h.. damages to be adjudged to ..h.., etc.

.....
Plaintiff's attorney.

2779 Verdict

We, the jury, find for and find that the property in controversy in this issue was not at the time of the attachment the property of

.....
Foreman.

2780 Judgment

(Caption)

This day came the plaintiffs,, by their attorney, and the of, by its attorneys, and the court having maturely considered the motion of the said to set aside the verdict of the jury rendered upon the trial of the issue made upon the petition of the said and grant it a new trial of the said issue, doth overrule the said motion and refuse to set aside said verdict; to which action of the court the said excepted; therefore it is considered by the court that the property named in the said petition of the said and therein claimed by it, was not when it was taken possession of under the attachment in this cause, the property of the said of And it is further considered by the court that the plaintiffs, recover of and from the said of, their costs about the trial of the said issue upon the said petition expended. And it appearing from the return of the sheriff upon the order of attachment herein that the property levied on and sold by him under the said order of attachment was sold for the sum of, which sum the said sheriff has in his hands to the credit of this cause, less, however, the expenses of the said sale and the sheriff's commissions, and it further appearing that that sum is less than sufficient to satisfy the judgment of the said plaintiffs against

the said company heretofore rendered in this cause, it is ordered that the said sheriff pay the said sum, less the said expenses and commissions, to the said plaintiffs,, to be credited upon the said judgment.

2781 Appeal, jurisdiction

An interplea involves a freehold if it claims the ownership of a fee simple title levied upon.⁸²

AMENDMENTS

2782 Scope, objection

Insufficient affidavits, bonds, and writs of attachments are amendable under Illinois statute.⁸³ An intervening creditor or an interpleader whose rights have been acquired *pendente lite* has no right to object to an amendment which merely changes the form of the action.⁸⁴

JUDGMENT

2783 Default

Under the present Illinois attachment statute, the plaintiff is entitled to a default at the return term at any time after the expiration of ten days from the last publication, if the court is in session, although a part of the publication has taken place before the term has begun and a part afterwards. It is not necessary that all of the publication should have been made before the convening of the court, as was formerly required by statute.⁸⁵

2784 Default, vacating, time

A judgment by default against an attaching debtor is final and separate from the garnishment proceeding; so that the continuance of the garnishment proceeding on the docket, under Illinois practice, is not a continuance of the case against the judgment debtor; and a motion to vacate the judgment against him must be made at the term at which it is rendered.⁸⁶

⁸² Ray v. Keith, 218 Ill. 182, 186 (1905).

⁸³ Meire v. Brush, 3 Scam. 22.

⁸⁴ May v. Disconto Gesellschaft, 211 Ill. 316.

⁸⁵ Kirk v. Elmer Agency, 171 Ill.

216; Lawver v. Langhans, 85 Ill. 141; Secs. 22, 23, Attachment act (Hurd's Stat. 1909, p. 195).

⁸⁶ Baldwin v. McClelland, 152 Ill. 42, 50 (1894).

2785 In personam

A plaintiff in attachment, in courts of record, is entitled to a judgment *in personam* if the defendant is personally served.⁸⁷

2786 Interest

It is permissible to render judgment in attachment, where service is had by publication, for the amount specified in the affidavit, together with accrued interest.⁸⁸

2787 Execution

A judgment in attachment is general in form and is against the person of the defendant, but it must be satisfied only by the sale of the attached property, where there was no personal service upon the defendant. No award of a special execution is necessary, although it is better practice to order such an execution.⁸⁹

2788 Appeal, jurisdiction

An attachment suit which is levied upon real estate does not involve a freehold, unless the real estate is claimed by an intervening third party adversely to the attachment defendant.⁹⁰

⁸⁷ Hogue v. Corbit, 156 Ill. 547.

⁸⁸ Pine Tree Lumber Co. v. Central Stock & Grain Exchange, 238 Ill. 454.

⁸⁹ Pyatt v. Riley, 252 Ill. 36, 40 (1912); Miere v. Brush, 3 Scam. 24.

⁹⁰ Clayton v. Clayton, 250 Ill. 433, 436 (1911).

CHAPTER XLI

ATTACHMENT IN AID

IN GENERAL

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IN GENERAL

2789 Attachment in aid defined

An attachment in aid is a statutory method for seizing general property of a defendant in a pending action to satisfy any indebtedness which might be established or the amount of damages which might be recovered therein.

2790 Nature and scope

In actions of assumpsit, covenant, debt, trespass, case and *scire facias* to make a person a party to a judgment, the plaintiff, under Illinois practice, may sue out a writ of attachment in aid of his action on the same grounds as in original attachment, when a defendant has not been arrested and has not given special bail. By express statutory provision an attachment in aid is part of and must be entitled in the suit in which the writ issues.¹

As the forms and points of practice in this proceeding are not entirely the same as in original attachment, the proceeding is treated separately.

¹ Secs. 31, 32, Hurd's Stat. 1909, p. 196.

2791 Scire facias to add party to judgment

A writ of attachment may issue in aid of a *scire facias* to make a defendant who was not served with original process a party to a judgment.²

AFFIDAVIT

2792 Illinois, requisites

Before a writ of attachment can issue in aid of an action of trespass or case, the affidavit in attachment must have an endorsement of the amount of damages for which the writ shall issue made by a judge of a court of record or master in chancery after he had examined the plaintiff, his agent or attorney for the purpose of making the endorsement.³

2793 Illinois, form

(Caption)

....., being duly sworn, deposes and says, that
 indebted to after allowing all
 just credits and set-offs, in the sum ofdollars
 and cents, upon to recover which
 amount an action has been commenced by said creditor against
 said debtor, in said court, and is now pending therein, and
 deponent prays an attachment in aid thereof; and deponent
 further states that said notresident.. of
 this state, and that place.. of residence
 at that, upon diligent inquiry, deponent has not been
 able to ascertain place.. of residence; that
 concealsel.... or stand.. in defiance of an.. officer, so
 that process cannot be served upon ha..
 departed from this state, with the intention of having
 effects removed from this state about
 to depart from this state with the intention of having
 effects removed from this state about to
 remove property from this state to the injury
 of the said ha.. within two years last
 past, fraudulently conveyed or assigned effects,
 or a part thereof, so as to hinder and delay cred-
 itors . . . ha.. within two years last past, fraudulently
 concealed or disposed of property so as to hinder
 and delay creditors about fraudu-

² *Ryder v. Glover*, 3 Scam. 547,
 548 (1842); Sees. 31, 32, c. 11,
 Hurd's Stat. 1909, p. 196.

³ Sec. 31, Hurd's Stat. 1909, p.
 196.

lently to conceal, assign or otherwise dispose of
 property or effects, so as to hinder or delay
 creditors; and further deponent sayeth not.

Subscribed, etc.

2794 Michigan

(Caption)

..... of, being duly sworn deposes and
 says, that he is plaintiff.. in the above entitled
 cause, and makes this affidavit for and on behalf of said plain-
 tiff..; that, defendant.. in said cause,
 justly indebted to plaintiff.. in said cause, in the
 sum of dollars, as near as may be, over and above
 all legal set-offs, which sum is now due and payable upon
 contract, and for the recovery of which said
 action is brought.

This deponent further says that he has good reason to
 believe and does believe that (State grounds for attachment).

Subscribed, etc.

WRIT

2795 Illinois, writ

State of Illinois, }
 County of } ss.

..... } In..... court of county.
 v. } Attachment in aid. No.

The people of the state of Illinois, to the sheriff of
 county, greeting:

Whereas, hath complained on oath to the
 circuit court of county, that the said above
 named plaintiff.. commenced heretofore the above entitled
 action, and that the same is still pending, and that the said
 defendant justly indebted to said plaintiff.. to
 the amount of dollars and cents,
 and oath having also been made, that the said defendant
 ha.. within two years last past, fraudulently
 conveyed or assigned effects, or a part thereof,
 so as to hinder and delay creditors ..ha.. within
 two years last past fraudulently concealed or disposed of
 property, so as to hinder and delay his creditors
 about fraudulently to conceal, assign, or
 otherwise dispose of property or effects so as to
 hinder or delay creditors and the
 said plaintiff.. having given bond and security according to
 the directions of the act in such case made and provided.

We, therefore, command you, that you attach so much of the lands, goods, chattels, rights, moneys, credits and effects of the said defendant to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the said complaint; and such lands, goods, chattels, rights, moneys, credits and effects, so attached in your hands to secure, or so to provide that the same may be liable to further proceedings thereupon, according to law, at a term of said circuit court of county, to be holden at, within and for the county of, on the day of, 19.., so as to compel the said defendant to appear and answer the complaint of said plaintiff, and that you also summon as garnishee., to be and appear at the said court on the said Monday of, 19.., then and there to answer to what may be objected against when and where you shall make known to the said court how you have executed this writ. And have you then and there this writ.

Witness, (clerk, etc.)

2796 Illinois, service

In actions commenced by summons and an attachment in aid, it is not necessary to serve the defendant with a writ of attachment when there is service of the summons and a levy has been made under the attachment writ.⁴

2797 Illinois, alias writ

No statutory authority exists in Illinois for the issuance of an *alias writ* of attachment in aid where the first writ has not been served or executed.⁵

2798 Michigan

State of Michigan, } ss.
County of }

The circuit court for the county of

.....
Plaintiff.., }
v. }
.....
Defendant.. }

⁴ Bailey v. Valley National Bank, 127 Ill. 332, 336 (1889); Sec. 31, c. 11, Hurd's Stat. 1909, p. 196.

⁵ Pack, Woods & Co. v. American Trust & Savings Bank, 172 Ill. 192, 196 (1898).

In the name of the people of the state of Michigan, to the heriff of said county of, greeting:

You are commanded to attach so much of the lands, tenements, goods, chattels, moneys and effects of defendant.. in the above entitled cause (which cause was heretofore commenced in said court) not exempt from execution, wheresoever the same may be found within the county of as will be sufficient to satisfy the demand of plaintiff.. in said cause, and costs of writ, and safely keep the same to satisfy any judgment that may be recovered by the plaintiff.. in said cause.

And in case you shall seize any property of said defendant.. in said county, but not sufficient to satisfy said demand and costs, then you are hereby further commanded to seize other property of said defendant.., subject to attachment, sufficient, with that seized in said county of to satisfy said demand and costs, wherever the same may be found in the state of Michigan.

You are also commanded to summon the defendant.. if to be found within said county of or in any other county of the state of Michigan where you may have seized property under and by virtue of this writ, to appear before the circuit court for the county of at the court house in the on the day of, 19.., at o'clock in the forenoon of said day, to answer the plaintiff... And of this writ make due return.

Witness, the honorable, circuit judge, at the this day of, in the year 19...

..... Clerk.

..... Deputy Clerk.

..... Attorney for plaintiff...

ABATEMENT

2799 Plea (Ill.)

(Caption)

And for a further plea in this behalf, by, her attorney, the said R, who has interpleaded herein, comes and further defends the wrong and injury, when, etc., and prays judgment of the said writ of attachment in aid, and that the same may be quashed, because she says that at the time of the suing out of said writ of attachment in aid, the said defendant, T, did not conceal himself, or stand in defiance of an officer, so that processes could not be served upon him, in manner and form as alleged in the said affidavit in attachment in aid. (Conclude to the country)

By, her attorney.

2800 Plea, adopting another's (Ill.)

(Caption)

Comes now D, administrator of the estate of T, deceased, by, its attorneys, and by way of plea to the fact stated in the affidavit upon which the attachment issued in this case, says that it adopts the plea duly filed herein on the day of, 19.., by T, defendant, now deceased, and prays that it, as administrator of his estate, and for the benefit and on behalf of said estate, may have the benefit of said plea, and thereupon prays judgment of the said writ of attachment, and that the same may be quashed.

.....
Attorney for

INTERPLEADING**2801 Interplea (Ill.)**

(Caption)

And R, by, her attorney, comes and interpleads, according to the form of the statute in such case made and provided and says that the realty attached and levied upon by virtue of the said writ of attachment, in this behalf, was at the time the same was so attached and levied, and still is, the property of her, the said R, and not of the said D; and this the said R is ready to verify; wherefore she prays judgment if her said real property ought to be detained by virtue of the said writ, etc.

.....
By, her attorney.

(Verification)

2802 Replication, confessing (Ill.)

(Caption)

Now comes the defendant, D, by, his attorney, and as to the said plea of interpleader of the said R, confesses the said plea of interpleader and the matters and things therein set forth, in manner and form as the same are therein set forth, and says that all such matters and things are true in substance and in fact; and this the said defendant prays may be inquired of by the country, etc.

.....
Defendant's attorney.

2803 Replication, notice, want of, requisites

A replication claiming a right to the attachment on the ground that the title to the property attached stood of record in the defendant in attachment and that the attaching creditor had no notice of the interpleader's claim, is good as between the parties in attachment, without alleging the recording of the certificate of the levy, as required by statute.⁶

2804 Replication, notice, want of (Ill.)

(Caption)

And for a further replication in this behalf, by leave of court first had and obtained, plaintiffs say that they ought not, by reason of anything in said interplea alleged, to be barred from having and maintaining their aforesaid writ of attachment against said property in said plea mentioned, because they say that at the time the said realty was attached and levied upon by virtue of said writ of attachment, the title to said real estate stood of record in said county in fee simple in the name of said defendant D; that at the time aforesaid, said defendant was indebted to plaintiffs in a large sum of money, to wit,, and that prior to and at the time of the levy of said attachment, plaintiffs, or any or either of them, had no notice of the alleged ownership of said property by said interpleader, and this the plaintiffs are ready to verify; wherefore they pray judgment and their damages to be adjudged to them, etc.

⁶ Ray v. Keith, 218 Ill. 182, 187 (1905).

CHAPTER XLII

ATTACHMENT OF WATER-CRAFT

| IN GENERAL | RELEASE |
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IN GENERAL

2805 Remedy, nature

The remedy provided by the Mississippi Code for labor and materials furnished on account of water-crafts is cumulative to the common law possessory lien, and is not exclusive.¹ The remedy, being in the nature of a lien, is in that state enforceable in courts of chancery in the absence of a statutory direction to the contrary.²

2806 Rules of court

Although the Michigan supreme court is authorized by statute to provide rules regulating proceedings had under the Water-Craft act, no such rules have thus far been made by said court.³

¹ c. 85, Code 1906; *Kornosky v. Hoyle*, 52 So. 481 (Miss. 1910).

² *Archibold v. Citizens Bank*, 64 Miss. 523, 528 (1886).

³ *Detroit Lumber Co. v. Auxiliary Yacht*, 156 Mich. 565, 566 (1909); (10,830), C. L. 1897.

JURISDICTION

2807 State courts

A state court has jurisdiction in an action of tort where the damage done is wholly upon land and where the origin of the wrong is upon navigable waters.⁴

PARTIES

2808 Part owner, release bond

A part owner of a vessel which had been released from an attachment cannot become a party defendant to the attachment suit after the giving of a release bond, because a subsequent judgment can only be against the principal and the surety on the release bond.⁵

PETITION

2809 Illinois

State of Illinois, }
 county. } ss.

In the court of county,
 To the term, 19...

To the honorable the judges of the court of
 the county of, in the state of Illinois.

Your petitioner, of county, com-
 plains of, a resident of, in said
 county, sole owner of the tug boat,
 and makes him defendant herein.

Your petitioner shows that it is a corporation organized and
 doing business in the state of Illinois under and by virtue of
 the laws of said state; that your petitioner is and was at the
 time of the accident and damages hereinafter mentioned, the
 proprietor and manager of a public warehouse of class A,
 said warehouse being situated in said county and
 fronting on the branch of the river
 at island, and being about feet from
 the east bank or shore of said branch, and it was at said time
 engaged in transacting business in said warehouse, having
 before said time regularly procured from the
 court of county a license to transact said business
 under the laws of said state, which said license was duly and
 regularly issued according to the statute in such case made
 and provided and was in full force and effect at the said

⁴ Johnson v. Chicago & Pacific
 Elevator Co., 105 Ill. 462, 469, 119
 U. S. 388, 397 (1882-1886).

⁵ Johnson v. Chicago & Pacific
 Elevator Co., 105 Ill. 467.

time of said accident and damages hereinafter stated; that said warehouse at said time was tight, firm, strong and in good order and condition and in every way well suited and adapted to the purpose for which it was used, viz.: to store grain in; and contained at said time amongst other things some hundred bushels of shelled corn, which said corn was in a bin in or near the corner of said warehouse; said bin being also at said time tight, staunch, firm and strong and in every way well adapted to hold and contain the same.

Your petitioner further shows that on or about the day of, 19.., and at the time of the accident and damages hereinafter complained of, said was and still is the owner of the said tug boat; that said tug boat, was at said time and still is a water-craft and tug boat of above tons burden used and intended to be used in navigating the waters of this state and the canals of this state, and having its home port in this state and is now in the port of, in said county.

Your petitioner further shows upon information and belief that on and about the day of, 19.., the said tug boat, in the line of her employment had a certain schooner, to wit, the, attached to said tug boat and made fast by hauser or tug line, in charge and under the officers of said tug boat's management and control, and was engaged in towing the same on the said branch of the said river in said county; that at said time and place said tug and schooner were so carelessly and negligently managed by the officers and crew of said tug boat, and said schooner was so carelessly and negligently towed by said tug boat and its master thereon and those having said tug boat in charge and under their management and control and being the agents and employees of said owner of said tug boat, that said schooner was allowed to and did at said time and place come in contact with said warehouse and bin, and said schooner was on account of said carelessness and negligence allowed to and did run head on into said warehouse and bin; by reason whereof, and for no other cause, and not on account of any negligence, fault or misconduct of your petitioner, or any defect in said warehouse or bin, the said schooner's jib-boom broke, penetrated and went through the walls of said warehouse and bin and caused a large quantity of said corn therein contained, to wit, bushels to, and it did, spill and run out of said bin and warehouse into said branch of said river, and thereby became and was lost, greatly to the damage of your petitioner; that in order to ascertain the exact amount of said corn lost as aforesaid, it became and was necessary for your petitioner to, and he did go to, a great expense, to wit, dol-

lars; that the damages done to said warehouse and bin on account of said accident as aforesaid was dollars. That your petitioner has been greatly damaged on account of the loss of the use of said bin while repairs were being made. That by reason of said accident and damages as herein set forth and charged, your petitioner has been and is greatly damaged and has suffered loss to the extent of dollars together with interest thereon from, which amount is still due and unpaid to your petitioner after allowing all payments and just set-offs, which have been demanded of said defendant, but he refuses to pay the same or any part thereof.

Your petitioner therefore prays that a writ of attachment may issue against said defendant directed to the sheriff of county, commanding him to attach said tug boat and water-craft and to summon said defendant to appear at the term of said court according to the statute in such cases made and provided.

And that upon the final hearing of this cause the court may be pleased to decree and subject said tug boat together with her tackle apparel and furniture to a lien for the damages aforesaid with interest and costs; and that your petitioner may have such other and further relief as he is entitled to in the premises.

And your petitioner will ever pray, etc.

..... Petitioner.

(Attach seal of corporation)

..... Attorneys for petitioner.

State of Illinois, }
..... county. } ss.

....., on oath doth depose and say that he is the agent of the, petitioner, and is duly authorized to make this affidavit; that he has heard read the above and foregoing petition and knows the contents thereof; that the facts alleged in said petition are true of his own knowledge and belief, except as to matters and things therein stated on information and belief, and as to them he verily believes said facts to be true.

.....

Subscribed, etc.

ATTACHMENT BOND

2810 Illinois

Know all men by these presents, that we, and, are held and firmly bound unto in the penal sum of dollars and cents, lawful money of the United States, for the payment of which said sum, well and truly to be made, we bind ourselves,

our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this day of, 19...

The condition of the above obligation is such, that whereas, the above bounden has, on the day of the date hereof, prayed an attachment out of the court of county at the suit of against the tug boat, property of the above named, the said being the defendant in said cause for the sum of dollars and cents, and the same being about to be sued out of said court, returnable on the day of, 19.., to the term of the said court then to be holden.

Now, if the said shall prosecute its said suit with effect, or in case of failure therein, shall well and truly pay and satisfy the said all such costs in said suit, and such damages as shall be awarded against the said, its assigns or legal representatives (or heirs, executors or administrators), in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligation to be void; otherwise to remain in full force and effect.

(Signatures and seals)

Signed, sealed and delivered in the presence of

.....

WRIT

2811 Illinois

State of Illinois, }
..... county. } ss.

The people of the state of Illinois, to the sheriff of county, greeting:

Whereas, of county, hath complained that, sole owner of the tug boat, is justly indebted to the said, in the sum of at least dollars and cents, together with interest thereon from, 19.., for which he claims a lien upon the said vessel, and has given bond with security as required by law,

We, therefore, command that you attach the said tug boat, her tackle, apparel and furniture to satisfy such demand and costs, and all such demands as shall be exhibited against said vessel according to law; and having attached the same, that you summon the said, sole owner, as aforesaid, to be and appear before the court of county, at its next term to be held at the court house in the city of, in said county, on the Monday (being the day) of 19.., then and there to

answer what may be objected against him, and the said tug boat

And have you then and there this writ, with a return thereon in what manner you shall have executed the same.

Witness, clerk of our said court and the seal thereof at, in said county, this day of, 19...

.....
Clerk.

(Seal)

Return

By virtue of the within writ I did levy upon and attach all the right, title and interest of the within named in and to the tug boat, together with her tackle, apparel and furniture. Also served the within writ on the within named by reading the same to him this day of, 19...

..... Sheriff.
By Deputy.

The above property was released as per order hereto annexed.

..... Sheriff.
By Deputy.

RELEASE

2812 Bond, scope

Upon becoming security on a release bond given under the Attachment of Water-Craft act the surety consents to the entry of a judgment against him at the time judgment is rendered against the principal.⁶

2813 Bond (Ill.)

Know all men by these presents, that we,, owner of the tug boat, as principal, and, as surety, are held and firmly bound unto in the penal sum of dollars, lawful money of the United States of America, to be paid unto the said, or its legal representatives, for the payment of which said sum, well and truly to be made, we bind ourselves, and each of us jointly and severally, and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this day of, 19...

The conditions of the above obligation is such that whereas

⁶ Johnson v. Chicago & Pacific Elevator Co., 105 Ill. 468; Sec. 21, c. 12, Hurd's Stat. 1909.

a petition was filed in the court of county on the day of, 19.., by the said against the said, the tug boat, her tackle, apparel, and furniture in a certain action, etc., for damages therein alleged to be due and owing to the said from the said, owner of the said tug boat, amounting to dollars and cents, together with interest thereon from

Now, therefore, if the above bounden owner of the said tug boat, and who desires the return of the said tug boat, now in the hands of the sheriff of said county, attached by virtue of said petition, and a writ issued in accordance therewith, shall and will pay all money adjudged to be due said by the said court of county, with costs of suit, then the above obligation to be void, otherwise to remain in full force and effect.

(Signatures and seals)

Taken and approved by me this day of, 19...
.....
Clerk.

2814 Writ of restitution

State of Illinois, }
..... county. } ss.

The people of the state of Illinois, to the sheriff of said county, greeting:

Whereas you were lately commanded by our court of county, to attach the tug boat her tackle, apparel and furniture, to satisfy of a certain claim of the alleged amount of dollars and cents and interest thereon from And, whereas,, the owner of said tug boat has this day filed in said court his certain bond, in accordance with section 15 of chapter 12 of the Revised Statutes of Illinois,

Now, therefore, we command that you return the said property so by you attached, to, owner, etc., according to law and the statutes in such case made and provided.

Witness, etc.

DEMURRER

2815 Affidavit of merits, necessity

A demurrer to a petition for an attachment of a water-craft is not available without an affidavit of merits filed at the time that the demurrer is interposed.⁷

⁷ Johnson v. Chicago & Pacific Elevator Co., 105 Ill. 467; Sec. 19, c. 12, Hurd's Stat. 1909.

2816 Affidavit of merits (Ill.)

(Venue)

....., of said county and state, being first duly sworn on his oath, says that he is one of the claimants of the tug attached in this cause and was made a defendant therein; and that he verily believes that he has a good defense to the said suit upon the merits as to the whole of the plaintiff's or petitioner's claim; and further affiant saith not.

Subscribed, etc.

ANSWER**2817 Illinois**

(Caption)

The answer of to the petition of the against the tug shows to the court that said has been notified of this suit, that he is a claimant and part owner of the water-craft attached in this cause; that he denies that the said water-craft is named the, and states that she is not named the; and that he denies that he is the sole owner of the water-craft attached herein by the name of

This claimant further answering says that he has no knowledge as to whether the petitioner is a duly organized corporation or is proprietor of the warehouse described; that he admits that a warehouse as described is located on the of the river, but as to its distance leaves petitioner to his proof; and he denies that said warehouse is a proper distance from the river.

This claimant further denies that the said warehouse is well suited, located and situated as to vessels and adapted for the binnery as to them, but says the same was located on a public navigable stream and too near the bank thereof for safety; that this claimant has no knowledge of the amount of shelled corn claimed to have been in said bin, and denies that said bin was tight, strong and adapted to the binnery and location.

This claimant admits that the tug boat is a water-craft of about tons burden and engaged in navigating the waters of this and other states; he admits that the said tug had the schooner in tow, but denies that the said schooner was under the sole management and control of said tug at the said time and place; he denies that the said tug was carelessly managed by its officers and crew and alleges the same on information and belief; that he denies also that the said came in collision with the said elevator by the sole act of the tug boat as its misconduct.

That this claimant admits that the jib-boom of said schooner did penetrate the said warehouse and that some corn was spilled and lost, but this claimant has no knowledge of the amount or value thereof and leaves the complainant to his proof; that he has no knowledge of the expense attached for repairing the same or the amount of damage to said bin, or the amount of the loss and damage claimed by the petitioner.

That this claimant alleges on information and belief that the collision referred to in said petition was occasioned by want of care and skill of the persons managing the said schooner, together with other natural causes; that the same was occasioned in the night time; that a strong current was setting through the river at that point occasioned by the opening of the and a change of wind so that the current of the said stream river was changed from a current down stream to a current up stream, which had not been sufficiently calculated upon by the officers and crew of the said schooner as they approached the said elevator; that the said elevator and warehouse upon the said river was built too close to the said stream; that the jib-boom of the said schooner was only of the ordinary length of schooners of said class; that the wall of the said bin was not of sufficient strength and thickness for a wall that was subject to being breached by the jib-booms of schooners in the navigation of said stream; that the blow of the schooner was a very slight one to said wall; that the collision did not break the said jib-boom or a single rope on board of said schooner; that an outer wall of such an elevator alongside of such a stream should be so strong as to break and carry away the jib-boom before allowing it to penetrate the wall, as this claimant is informed and believes.

Wherefore, this claimant asks to have the above cause dismissed at the cost of the petitioner.

.....
(Defendant)

(Venue)

....., of said county and state, and first duly sworn on his oath, says that he has read and heard read the foregoing answer signed by him and that the same is true except as to those matters stated on information and belief, and as to these matters he believes them to be true.

.....
Subscribed, etc.⁸

⁸ Add affidavit of merits.

JUDGMENT

2818 Order denying leave, etc.

(Caption)

This day came the said plaintiff and said defendants by their inspective attorneys and the said defendant by his attorney now here moves the court for leave to file an answer and an affidavit of merits in said cause, and the court after hearing argument of counsel thereon and being fully advised in the premises doth overrule said motion; to which ruling of the court the said defendant by his attorney now here excepts. And thereupon came the jurors of a jury of good and lawful men, to wit: (Insert names) who were duly empaneled and sworn to well and truly assess the plaintiff's damages and a true assessment render according to the evidence, and who, after hearing the testimony adduced, retire from the bar of the court to consider of their verdict; and thereupon return into court and say: (Insert verdict).

Whereupon the said defendant by his attorney, enters his motion to set aside said verdict and for a new trial of said cause.

2819 Surety

A judgment for the petitioner in a proceeding under the Attachment of the Water-Craft act may include the surety on the release bond.⁹

2820 Judgment (Ill.)

(Caption)

And now come the respective parties to this cause by their attorneys, and said cause coming on to be heard upon the motion heretofore entered herein for a new trial, and the court having considered said motion overrules the same; and the jury having heretofore assessed the damages of the plaintiff on occasion of the premises against the said defendant by reason of his default for not having filed an affidavit of merits with his demurrer and exceptions herein in accordance with the statute in such case made and provided over and above its costs and charges by its suit in this behalf expended at the sum of dollars; and it further appearing to the court that the said tug heretofore attached in said cause has been released and discharged from custody and a bond given as provided by statute in the penal sum of dollars and that said is principal and one is surety in said bond;

⁹ Johnson v. Chicago & Pacific Elevator Co., 105 Ill. 468; Sec. 21, c. 12, Hurd's Stat. 1909.

Therefore, it is considered that the plaintiff do recover against said its damages aforesaid in form aforesaid and by reason of the statute in such case made and provided assessed to the sum of dollars, together with its costs and charges to be taxed, and that the plaintiff have execution therefor.

2821 Appeal, application

(Caption)

And now comes by his attorney and moves the court to grant an appeal to the said from the order of this court of the day of, 19.., denying to the said leave to defend against the petition in said cause.

Dated, etc.

.....
Attorney for

CHAPTER XLIII

BOUNDARY LINES (ILLINOIS)

| | |
|----------------------------|----------------------------------|
| §§ | §§ |
| 2822 Notice of application | 2827 Decree |
| 2823 Petition | 2828 Oath of commissioners |
| 2824 Summons | 2829 Order sustaining exceptions |
| 2825 Answer | 2830 Amended report |
| 2826 Replication | 2831 Order approving report |

2822 Notice of application

To

You are hereby notified that the undersigned,, will appear before the circuit court of county, at its term, 19.., to wit, on, the day of, 19.., to be that day holden at the court house in the city of, county, Illinois, or as soon thereafter as a hearing before the said court can be had, for the purpose of making application to the said circuit court for the appointment of a commission of surveyors to make a survey of and permanently establish the corners, boundaries and lines of the following described lands, to wit: The division line between the south-east quarter of section, township north, range, west of the principal meridian, situated in the county of and state of Illinois, owned by

And the following described premises, to wit, situated in the county of and state of Illinois, to wit: The north half of the south-west quarter of section, in township north, range, west of the principal meridian, owned by

In accordance with the provisions of an act of the legislature of the state of Illinois, entitled, "An Act to provide for the permanent survey of lands," approved the 10th day of May, 1901, and in force July 1, 1901. When and where you can appear and defend the said application if you see fit.

Dated at

By, his attorney.

Service

(Venue)

....., a resident of said county, being duly sworn, deposes and says that he

served the foregoing notice upon the said by personally delivering to the said a true copy thereof on the day of, 19...

Subscribed, etc.

2823 Petition

State of Illinois, } ss.
..... county. }

In the circuit court of county.

To the term, 19..

..... }
v. } Petition for appointment of commission
..... } of surveyors to permanently establish lost
..... } and disputed boundary lines.

To the honorable, judge, presiding in said court.

Humbly complaining, this petitioner,, respectfully represents unto your honor:

That he is a resident of the township of, in the county of and state of Illinois, and that he is the owner, in fee simple, of the following described tract of land, viz.: (Set forth legal description) of the third principal meridian, situated in the county of and state of Illinois.

That the defendant to this petition, the said, is a resident of said county, and is in the possession of, and claims to own, in fee simple, the land immediately west of and adjoining that of your petitioner, above described, to wit: (Describe said land).

That the true location of the division line between the said southeast quarter of said section owned by said petitioner herein and the said north half of the southwest quarter of said section owned by said defendant herein, as described above is in dispute, and that no monument or monuments now mark the said division lines upon which your petitioner and the said are able to agree to be reliable or correct; that the monuments, if any there be, marking the said division or boundary lines, are lost and in dispute, and that the true location of the said division or boundary line between the said respective tracts of land owned by your said petitioner herein, and the said defendant herein, cannot be agreed upon by your petitioner, the said, and the said defendant and cannot be ascertained by them except by the aid of this honorable court, as petitioner is advised and so avers, and petitioner is desirous that the said division or boundary line between the said respective tracts of lands owned by him, and the said defendant herein, may be permanently ascertained and established.

That the said before the filing of this petition in this honorable court, and before the service of the notice

upon him hereinafter mentioned, refused to enter into an agreement in writing with petitioner to comply and abide by the survey of some competent and disinterested surveyor of the said above described lands and the said division or boundary line so in dispute between your petitioner and the said defendant,, in accordance with the provisions of section 1 of the act of the legislature of the state of Illinois entitled, "An Act to provide for the permanent survey of lands," approved May 10, 1901, and in force July 1, 1901.

That he therefore caused a notice in writing to be served upon the said, the owner of the said described lands so adjacent to that of this petitioner herein mentioned and described, by delivering to him a true and complete copy of such notice more than ten days prior to the first day of the present term of this honorable court, on, to wit, the day of, 19.., by which said notice the said was notified that on, the day of, 19.., or as soon thereafter as a hearing in the premises before said court could be had, this petitioner would make application to this honorable court for the appointment of a commission of surveyors to make survey of and permanently establish the said division or boundary line so in dispute, under and by virtue of the provisions of the act of the legislature of the state of Illinois aforesaid; a true copy of the said notice and of the return of service thereof are attached to this petition and marked exhibit "A" and made a part hereof.

Forasmuch, therefore, as this petitioner is without remedy in the premises except by the aid of this honorable court, and to the end that the said, who is made a party defendant to this petition, may be required to make answer unto the same, so far as answer may be required, but not under oath, answer under oath being hereby expressly waived; that the said may be required to show cause to the court, if any he may be able to show hereto, why a commission of entirely disinterested and competent surveyors shall not be appointed by this honorable court in accordance with the prayer of this petition to make survey of, and to permanently establish the said division or boundary line so in dispute; that a commission of such surveyors may be so appointed by this court to make the survey aforesaid, in accordance with the provisions of the law in such case made and provided, and with the practice of this honorable court; and that this petitioner may have such other and further relief in the premises as to your honor shall seem meet, proper and equitable.

May it please your honor to grant a writ of summons out of this honorable court, directed to the sheriff of said county, commanding him that he summon the said to be and appear before this honorable court, on the day of the term thereof,, 19.., and then

and there to answer this petition, and to show cause, if any there be, why the prayer of this petition should not be granted, and to abide any further order of this honorable court in the premises.

.....

.....
Solicitor for petitioner.
(Verification)

2824 Summons

(Venue)

The people of the state of Illinois, to the sheriff of said county, greeting:

We command you that you summon if he shall be found in your county, personally to be and appear in and before the circuit court of said county, on the day of the next term thereof, to be holden at the court house in in said county, on the of, 19.., to answer unto in his certain petition for appointment of a commission of surveyors, etc, filed in said court on the chancery side thereof. And have you then and there this writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness (clerk, etc.).

2825 Answer

(Caption)

And now comes, the defendant in the above entitled cause, and denies that the said petitioner is the owner in fee simple of the southeast quarter of section, township north, range west of the principal meridian, in county, Illinois.

Defendant admits that he is a resident of said county,, and in the possession of the north half of the southwest quarter of section, township north, range west of the principal meridian, in county, Illinois, and avers that he is the owner of said premises in fee simple.

Defendant denies that the location of the division line between the said tracts of land owned by defendant herein and claimed to be owned by petitioner, is in dispute.

Defendant further denies that no monuments mark the division lines between the said tracts of land, but on the contrary avers that the boundary line between the said tracts of land have been fixed and agreed upon for more than twenty years last past.

Defendant further avers that in and by said petition the said petitioner is seeking to have the said boundary lines be-

tween the said tracts of land changed, and that said boundary lines have been fixed as aforesaid for more than twenty years last past.

Defendant admits that he refused to enter into an agreement in writing with petitioner to have a survey of said lands made, for the reason that there was no necessity of having a survey made; that the boundary lines have already been fixed and abided by, both by petitioner and defendant and their predecessors to the title for more than twenty years last past.

Defendant denies that there is any reason why a commission of competent surveyors should be appointed by the court, and further denies that there is any necessity for such commission.

And this defendant further answering denies that petitioner is entitled to the relief or any part thereof in the said petition demanded, and prays the same advantage of this answer as if he had pleaded or demurred to the said petition, and prays to be dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

.....
By, his attorney.

2826 Replication

(Caption)

The replication of, petitioner, to the answer of, defendant.

This repliant, saving and reserving unto himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto says:

That he will aver and prove his said petition to be true, certain and sufficient in the law to be answered unto, and that the answer of the defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing, whatsoever, in said answer contained, material or effectual in law to be replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said petition he has already prayed.

2827 Decree

(Caption)

Now on this day of, 19.., it being one of the days of the term, 19.., of said court, comes the petitioner,, by, his solicitor, and the defendant,, by, his solicitor; and it appearing to the court that the petitioner filed his petition herein more than ten days prior to the first day of the present term of this court, on, to wit, the

day of, 19..; and it further appearing to the court that the defendant was on the day of, 19.., duly notified in writing that on the day of, 19.., of the present term of this court, or as soon thereafter as a hearing before the court could be had, the petitioner would apply to this court for the appointment of a commission of three disinterested surveyors to survey and re-establish the lost and disputed boundary line between the lands of the petitioner and the defendant hereinafter mentioned and described; and it further appearing to the court that afterwards the said defendant,, filed his answer to the said petition, on, to wit, the day of, 19.., to which answer the petitioner, on, to wit, the day of, 19.., filed his general replication; and the court having examined the several pleadings filed in this cause, and having heard the argument of counsel, it doth further appear to the court that it hath jurisdiction of the subject matter of this cause and of the parties thereto, and that the boundary lines between the lands of the petitioner and the defendant hereinafter mentioned and described, and the monuments marking the same are in dispute, and that the true location thereof cannot be settled and agreed upon by and between the petitioner and the defendant, and that the prayer of the petitioner for the appointment by the court of such commission of three disinterested surveyors to survey and permanently re-establish the boundary line so in dispute between the following described premises, to wit: The southeast quarter of section, township north, range west of the principal meridian, situated in the county of and state of Illinois, owned by the petitioner herein, and the following described land, to wit: The north half of the southwest quarter of section, township north, range west of the principal meridian, also situated in said county and state, owned by the defendant herein should be granted; and it further appearing to the court that, of Illinois,, of, Illinois, and, of, Illinois, are surveyors and entirely disinterested in the survey of the said lands and of all the matters in dispute in this cause, and are competent to serve upon the said commission:

It is therefore ordered, adjudged and decreed by the court, that the said be, and they are hereby appointed as a commission of surveyors to make a survey for the purpose of re-establishing the boundary and division line between the southeast quarter of section, township north, range west of the principal meridian, situated in the county of and state of Illinois, owned by the petitioner,, and the north half of the southwest quarter of section, township north, range west of the principal meridian, as aforesaid, owned by

It is further ordered by the court that each of the said surveyors hereby appointed a member of the said commission of surveyors, before entering upon the duties thereof, take and subscribe an oath or affirmation before some officer duly authorized to administer oaths, to fairly and impartially make the said survey in accordance with law and the order of the court, and a true report make thereof to the court according to the best of his ability.

It is further ordered by the court that the said commission of surveyors shall then proceed to make the said survey and to make report thereof to the court at this or the next term thereof according to plat and notes of said survey; said commissioners are hereby authorized and empowered to administer an oath to, and take the testimony of, any person or persons who may be able to identify any original government corner or witness thereto, or other legally established corners or other monuments that may have been in existence over twenty years and recognized as original government corners by the adjoining proprietors, and to incorporate the same with their report; and they are further authorized to examine such record and documentary evidence, government field notes, plats and former surveys, deeds and all records thereof as they may find necessary to enable them to properly make such survey and report; and they shall incorporate in their said report a sufficient synopsis of, or reference to, such record and other documentary evidence, so examined and considered by them, as to enable the court to identify and refer to the same, together with any other evidence heard and considered by them; and that they file their said report herein without any unnecessary or unreasonable delay.

2828 Oath of commissioners

(Caption)

We, each and of us, do solemnly swear that we will fairly and impartially make survey of the boundary line in dispute between the parties to the above cause as is particularly mentioned and described in the decree of the court in said cause entered on the day of, 19.., according to law and the order of the court, and a true report thereof make to the court according to the best of our ability.

(Signatures)

2829 Order sustaining exceptions

(Caption)

And now come and, a commission of surveyors, appointed by prior order of this court, in the above entitled cause, to re-establish the government corners and the boundary lines as determined by the original government surveys between the lands of the said petitioner and the said defendant.

And now comes, defendant in the above entitled cause, and files his exceptions to the said report of the said commission; and now this cause coming on further to be heard upon the said report of the said commission and the exceptions thereto, the said appearing by, his attorney, and the defendant,, appearing by, his attorneys, and the court having heard read the report and having examined the same and having heard the argument of counsel upon the said report, and the said exceptions thereto, and being fully advised in the premises, it is ordered by the court that the said exceptions to the said report be sustained and that the said report be rejected.

To which action of the court in sustaining said exceptions and in rejecting said report, the said, by his said attorney, then and there excepted.

It is thereupon ordered by the court that the said commission heretofore appointed is directed to make a new survey of the said lands and to establish the corners and boundaries between the said tracts of land owned by petitioner and by said defendant. The said commission is further directed that in re-establishing the said corners and boundaries, it shall be guided by the original corners as made by the government surveyors and by the field notes as returned by them. Said commission of surveyors is authorized to administer an oath, and take the evidence of, and incorporate the same with their survey, of any person who may be able to identify any original government or other legally established corner or witness thereto or government line, tree or other noted object, and all stone corners or other monuments that have been in existence over twenty years, and recognized as original government corners by the adjoining proprietors. That said commission is directed to proceed to make the said survey and report its proceedings, together with a plat and notes of said survey, to this or the next term of this court.

2830 Amended report

(Caption)

To the honorable judge of the circuit court of county, Illinois:

We, the undersigned, appointed by this honorable court as a commission of surveyors to determine the lines and boundaries between the lands of the parties in the above entitled cause, herewith make, as per your instructions, our amended report.

Upon reconvening at the court house at on, 19 . . . , we discovered on plat, recorded in survey record book, page, evidence of the correct location of the southeast corner of section This being the case the location of the quarter corner on the south side of

said section, the southerly terminus of the line in question between the parties to this cause, would be incorrect.

We have accordingly re-run the line between the north and south quarter corners of said section according to the government survey thereof and planted stones on that portion lying between the land of parties to this cause, which line on our amended plat we have for more clearness shown in red.

This line shown in red we hereby agree to be the correct government division line between the southeast and southwest quarters of said section.

The following is an itemized account of the additional expense of this commission. (Insert itemized account.)

All of which we respectfully further submit.

(Signatures)

Commission of surveyors.

2831 Order approving report

(Caption)

Now on this day of, 19.., it being one of the regular days of the present term of this court, this cause comes up for hearing, the petitioner appearing by and, his solicitors, and the defendant,, by, his solicitors. And it appearing to the court that on the day of, 19..,, who had theretofore been appointed by this court as a commission of surveyors in this cause, filed their amended report as such commission of surveyors, accompanied by a plat of the premises in controversy; and it further appearing to the court that on the day of, 19.., the defendant filed his objections to said report and survey; and both the complainant and defendant having expressly waived a jury for a hearing upon said amended report and survey and the objections thereto, this cause comes up for a hearing before the court upon said amended report and survey.

And the court having examined said amended report and survey and having heard the evidence introduced in open court in support thereof and the argument of counsel, and being fully advised in the premises, finds that said amended report and survey is in all respects correct.

It is therefore ordered, adjudged and decreed by the court that said amended report and survey accompanying the same be and the same hereby are in all respects approved and confirmed by the court; and that the line in red shown on said plat and marked "true quarter section line" is the true and correct government division line between the southeast quarter and the southwest quarter of section, in township north, of range west of the principal meridian, in county, in the state of Illinois.

It is further ordered, adjudged and decreed by the court that the taxation of the costs and expenses of this suit, including the fees and expenses of said commission of surveyors and the per diem and fees of the witnesses, and the fees of the stenographer be reserved for the future consideration and decision of the court; and that the question of the distribution of such costs and expenses among the parties to this suit be also reserved for the future consideration of the court.

It is further ordered, adjudged and decreed by the court that all of said objections of the defendant be and the same are hereby overruled, with the exception of the objection relative to the costs and expenses of this proceeding as aforesaid, which last named objection is reserved and postponed for the further consideration and decision of this court as above stated.

It is further declared, adjudged and decreed by the court that the question of possession and of title were not litigated or adjudicated in this suit.

....., Circuit Judge.

CHAPTER XLIV

CAVEAT

§§
2832 Affidavit
2833 Caveat

§§
2834 Writ
2835 Judgment

2832 Affidavit

State of, }
..... county. } ss.

I,, hereby make oath that I am the plaintiff in a caveat proceeding affecting a certain tract of land known as timber tract, in county, Virginia, said caveat to be filed in the office of the register of the land office,, Virginia, and the matter tried in the circuit court of county, Virginia. That said caveat is made in good faith for the purpose of procuring the said lands and protecting my own title thereto, in my own name and not in trust for any other person. That I claim said land by virtue of a better title thereto than the applicant for a grant thereof.

Given, etc.

Subscribed, etc.

2833 Caveat

To honorable, register of the land office of Virginia:

The within named caveator respectfully represents that on the day of, 19.., filed in the land office of Virginia an application for a grant to a tract of land lying in county, Virginia, on the waters of creek, containing acres. Said application was accompanied by a plat and survey made by, surveyor of county, Virginia, the affidavits thereto bearing date on the day of, 19..

Your caveator hereby protests against the issuing of a grant to the said tract of land and respectfully submits that the same ought not to issue for the following reasons:

1. That at the time the said survey was made this caveator was in actual possession of the said land embraced in said survey, claiming the same under written color of title, of record in the clerk's office of county court, said written

color of title extending back for many years; and the said failed to give this caveator any notice whatever of any intention on his part of making an entry or attempting to locate any land warrant on same as required by section 2311 of the Code of Virginia.

2. That said grant ought not to issue because as a matter of fact there is no vacant or unappropriated lands within the said survey, the same being covered by a grant to of lands lying partly in and partly in in 19... The lands embraced in this survey having passed from the said to this caveator by a succession of transfers, descents, devises and grants.

3. That if for no other reason that said grant ought not to issue to the said because this caveator and those under whom he claims have held actual possession of the said land under written color of title thereto of record, exercised rights of ownership over the same, and have regularly paid the taxes thereon for many years, to wit, for a period to raise the presumption of a grant thereto even if the grant to should appear not to cover or embrace the whole of the land embraced by the survey of said

This caveator therefore prays that his caveat be entered by the register of the land office of the state of Virginia, and that the said register deliver to him a certified copy thereof to file with the clerk of the circuit court of the county of, as provided by section 3228 of the Code of Virginia.

This day of, 19...

Respectfully submitted,

....., By counsel.

....., p. q.

2834 Writ

Commonwealth of Virginia.

To the sheriff of the county of, greeting:

Whereas, hath entered a caveat against issuing a grant to for acres of land, situated on the waters of creek in county, state of Virginia, and surveyed by, surveyor of county, for the said, assignee, on the day of, 19..., because:

1. That at the time the said survey was made this caveator was in actual possession of the said land embraced in said survey, claiming the same under written color of title, of record in the clerk's office of county court, said written color of title extending back for many years; and the said failed to give this caveator any notice whatever of any intention on his part of making an entry or attempting to locate any land warrant on same as required by section 2311 of the Code of Virginia.

2. That said grant ought not to issue because as a matter of fact there is no vacant or unappropriated lands within the said survey, the same being covered by a grant to of lands lying partly in and partly in in 19.. The lands embraced in this survey having passed from the said to this caveator by a succession of transfers, descents, devises and grants.

3. That if for no other reason that said grant ought not to issue to the said because this caveator and those under whom he claims, have held actual possession of the said land under written color of title thereto of record, exercised rights of ownership over the same, and have regularly paid the taxes thereon for many years—at least for a period to raise the presumption of a grant thereto even if the grant to should appear not to cover or embrace the whole of the land embraced by the survey of the said

Therefore, we command you to summon to appear before the judge of our said court on the day of, 19.., (that being the third day of the term next, of circuit court) to defend his right to the said land. And have then and there this writ.

Witness,, clerk of the said court, at the court house, the day of, 19.., in the year of the commonwealth.

....., Clerk.

2835 Judgment

(Caption)

This day came again the parties by their attorneys and it seems to the court here that the law is for the defendant. Therefore, it is considered by the court that the said caveat be dismissed, and that the defendant recover against the plaintiff his cost by him in this behalf expended.

The caveator having announced his intention to apply for an appeal, it is ordered that this judgment be suspended for sixty days upon the execution before the clerk within thirty days of a bond in the penalty of, conditioned according to law.

CHAPTER XLV

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IN GENERAL

2836 Certiorari defined

Certiorari is a common law or statutory remedy to review proceedings of inferior courts which are not reviewable on appeal, error, or other modes of review.¹

2837 Origin

A writ of *certiorari* is of common law origin and is in force in Illinois as part of its adopted common law.

AT COMMON LAW

2838 Generally

Certiorari at common law is maintainable only when the inferior court or jurisdiction has exceeded its power, or it has proceeded illegally, and no appeal is given or writ of error will lie.²

2839 Amendment

A writ of *certiorari* should not issue to vacate an order which might be corrected by amendment.³

¹ *Troxell v. Dick*, 216 Ill. 98, 100 (1905).

² *Schlink v. Maxton*, 153 Ill. 447, 453 (1894).

³ *Gratiot County v. Munson*, 157 Mich. 505, 506 (1909).

2840 Negligence

A party will not be relieved by *certiorari* against a judgment which has been rendered as a result of his own negligence.⁴

2841 Pendency of proceeding

A common law writ of *certiorari* may issue without awaiting a final judgment or order in a proceeding over which the inferior tribunal has no jurisdiction and in which it makes an order which is prejudicial to the complaining party; but such a writ will not issue until the proceeding is terminated, and then only if it appears that the inferior tribunal has entered an illegal judgment or order, where the tribunal possesses jurisdiction to hear and determine the cause.⁵

2842 Personal rights

A writ of *certiorari* may issue in cases involving personal rights alone.⁶

2843 Under statute, interlocutory orders

In Michigan, an adverse decision based upon jurisdictional grounds, demurrer or other dilatory plea, is reviewable by writ of *certiorari*, in addition to being reviewable upon writ of error sued out to review the final judgment in the cause.⁷

PROCEEDINGS REVIEWABLE

2844 Quasi judicial

A *quasi* judicial proceeding is subject to review upon a writ of *certiorari*.⁸

2845 Civil service commissioners, laches

Certiorari is the appropriate remedy to review a proceeding of the civil service commissioners brought for the removal of an officer appointed under civil service rules and regulations.⁹ It

⁴ Hermann v. Butler, 59 Ill. 225, 227 (1871).

⁵ People v. Superior Court, 234 Ill. 186, 203 (1908).

⁶ Powell v. Bullis, 221 Ill. 379, 380 (1906).

⁷ 1905 Public Acts, p. 484 (Mich.).

⁸ Kinslow v. Pogue, 213 Ill. 302, 304, 305 (1904).

⁹ Chicago v. Condell, 224 Ill. 595, 597 (1907); Powell v. Bullis, *supra*.

is not a proper remedy to question the right of the civil service commissioners to remove a civil service employee when the commissioners have jurisdiction over the removal and proceed according to the forms of law applicable to such cases.¹⁰ In cases involving a discharge under the civil service law, the right to a writ of *certiorari* may be barred by unexplained delay in making the application for the writ.¹¹

2846 County seat, removal

Proceedings in the county court for the removal of a county seat may be reviewed upon *certiorari*.¹²

2847 Drainage commissioners

The writ lies to review the proceedings of drainage commissioners who proceed to enlarge the boundaries of a drainage district in which no appeal is given or other means provided by statute to review their decision.¹³

2848 Drainage organization

Certiorari is an appropriate remedy to review drainage organization proceedings.¹⁴ In *certiorari* to review these proceedings the only questions which can be raised are whether notice was given to the land owners, as is required by law, and whether the commissioners acted without authority of law in excluding lands which should have been included and in including lands which should have been excluded.¹⁵

2849 Highways

Proceedings to lay out a public highway are reviewable by *certiorari* at the suit of the public.¹⁶

2850 Mandamus

Mandamus proceedings are reviewable upon writ of *certiorari* under Michigan practice.¹⁷

¹⁰ *Joyce v. Chicago*, 216 Ill. 466, 470, 471 (1905).

¹¹ *Blake v. Lindblom*, 225 Ill. 555, 558 (1907).

¹² *Kinsloe v. Pogue*, 213 Ill. 305.

¹³ *Mason & Tazewell Special Drainage District v. Griffin*, 134 Ill. 330, 342 (1890).

¹⁴ *Dewell v. Sny Island Drainage District*, 232 Ill. 215, 223 (1908).

¹⁵ *Barnes v. Drainage Commissioners*, 221 Ill. 627, 630 (1906).

¹⁶ *People v. Highways Commissioners*, 240 Ill. 399, 406 (1909).

¹⁷ *Chicago, Detroit & Canada G. T. J. R. Co. v. Tappan*, 156 Mich. 567, 573 (1909).

2851 School trustees and boards

An owner may proceed by *certiorari* to quash an illegal record made by a board of education against his property for the location of a school house site thereon.¹⁸ So, is this an appropriate remedy to review the action of school trustees in uniting and dividing school districts.¹⁹

2852 Township boards

This writ lies to review the action of a township board in removing an assessor.²⁰

JURISDICTION

2853 Generally

Any court exercising general common law jurisdiction has an inherent authority to issue a writ of *certiorari*; and it may be awarded to all inferior tribunals and officers who exercise judicial or *quasi* judicial functions whenever they have exceeded their jurisdiction, or whenever they have proceeded illegally, and no appeal is allowed or no mode is provided for reviewing their proceedings, and such point of jurisdiction or illegality appears upon the face of the record.²¹

2854 Circuit and superior courts, Illinois

The circuit and superior courts have jurisdiction to award writs of *certiorari*.²²

The record of a civil service commission made in trying an employee is reviewable upon *certiorari* in a circuit court.²³

A circuit court has no jurisdiction over a writ of *certiorari* to review condemnation proceedings had in the county court, because a county court is not an inferior tribunal to the circuit court in proceedings under the Eminent Domain statute.²⁴

¹⁸ Southworth v. School Board, 238 Ill. 190, 192, 194 (1909).

¹⁹ Miller v. School Trustees, 88 Ill. 26 (1878), explaining and limiting Trumbo v. People, 75 Ill. 561 (1874).

²⁰ Merrick v. Arbelo Township Board, 41 Mich. 630, 631 (1879).

²¹ Mason & Tazewell Special Drainage District v. Griffin, 134 Ill. 339, 340; Powell v. Bullis, *supra*; Miller v. School Trustees, 88 Ill. 33;

Smith v. Highways Commissioners, 150 Ill. 385, 391 (1894); Dewell v. Sny Island Drainage District, *supra*.

²² Powell v. Bullis, *supra*; Bell v. Mattoon Water-Works & Reservoir Co., 235 Ill. 218, 219 (1908); Kinsloe v. Pogue, 213 Ill. 304.

²³ Kammann v. Chicago, 222 Ill. 63, 64 (1906).

²⁴ Bell v. Mattoon Water-Works & Reservoir Co., *supra*.

No writ of *certiorari* can issue from a circuit court to a county or probate court to review a probate matter which is reviewable under the statute on appeal, the previous statute on the same subject having been repealed by implication.²⁵

2855 Circuit courts, Michigan

In Michigan, the circuit courts have jurisdiction to issue writs of *certiorari* to all inferior tribunals.²⁶

2856 Supreme court, Illinois

No writ of *certiorari* can issue out of the supreme court to review a judgment of the appellate court in an action *ex contractu* or sounding in damages which, exclusive of costs, does not exceed \$1,000.²⁷ An interlocutory judgment of the appellate court is not reviewable in the supreme court upon this writ.²⁸

The *certiorari* statute is applicable to law and equity cases, for it is the nature, and not the form of the action that determines the *certiorari* jurisdiction of the supreme court. So that cases in chancery in which the relief sought is a money decree, or in which a money decree could be rendered, are reviewable upon *certiorari* only when the decree exceeds \$1,000.²⁹

In cases where a judge of an inferior court has no jurisdiction to entertain *habeas corpus* proceedings, a writ of *certiorari* may issue out of the supreme court to stop the proceedings in the inferior court and to bring them up for review by the supreme court; but such jurisdiction can only be exercised by the supreme court in protection of its appellate jurisdiction.³⁰

2857 Supreme court, Michigan

In actions at law, an adverse decision upon a motion to quash the writ or the declaration upon jurisdictional grounds, or a decision upon issues raised on demurrer, plea to the jurisdiction,

²⁵ Schaeffer v. Burnett, 221 Ill. 315 (1906); Sec. 68, c. 3, Hurd's Stat. 1911, p. 21.

²⁶ Merrick v. Arbela Township Board, *supra*.

²⁷ La Monte v. Kent, 253 Ill. 230, 233 (1912); Sec. 121, Practice act 1907 as amended in 1909, repealing sec. 8 of Appellate Court act and obviating Waschow v. Kelly Coal

Co., 245 Ill. 516, 517 (1910), and Globe Brewing Co. v. American Malting Co., 247 Ill. 622, 627 (1910).

²⁸ Riley v. Lamson, 253 Ill. 258 (1912).

²⁹ Lansingh v. Dempster, 255 Ill. 161, 163 (1912).

³⁰ People v. Superior Court, 234 Ill. 199, 203.

or other dilatory pleas, is reviewable, under Michigan practice, upon *certiorari* or writ of error.³¹ In *certiorari* proceedings the supreme court of Michigan considers questions of law alone.³²

PARTIES

2858 Petitioner, practice

The review of proceedings upon *certiorari* can be obtained only by a party to the record, or by a person who has a direct and immediate interest in the proceedings. A mere tax-payer is not such a party, nor has he such a direct and immediate interest in proceedings brought by or against a municipality, where no public funds are illegally disbursed.³³ Proceedings by *certiorari* must be prosecuted by the state's attorney, or by the attorney general where the injury involved solely affects the public; in which case, the public officer may himself be relator, or some member of the public who is injuriously affected by the wrong complained of.³⁴

PETITION GENERALLY

AT COMMON LAW

2859 Entitling, practice

The common law mode of entitling a proceeding by *certiorari* is in the name of the people, and not in the cause which it brings up.³⁵

2860 Allegations, scope

A common law writ of *certiorari* is solely tried upon the record brought up and not upon the allegations of the petition for the writ.³⁶

2861 Cause, dismissal

A petition for a writ of *certiorari* must show good cause for issuing the writ; and if it afterwards appears that the writ was

³¹ Boughner v. Bay City, 156 Mich. 193, 194 (1909); Acts 1905, No. 310 (Mich.)

³² Booker v. Grand Rapids Medical College, 156 Mich. 95, 97 (1909).

³³ People v. Lower, 254 Ill. 306, 313 (1912).

³⁴ People v. Highways Commissioners, 240 Ill. 406, 407.

³⁵ People v. Bacon, 18 Mich. 247, 254 (1869).

³⁶ Troxell v. Dick, *supra*; Highways Commissioners v. Smith, 217 Ill. 250, 251 (1905); Kammann v. Chicago, 222 Ill. 66.

improvidently issued, the writ should be quashed and the petition dismissed.³⁷

2862 Delay

In case of delay in applying for a common law writ of *certiorari* the petition for the writ must show some legal excuse why the application was not made sooner.³⁸

2863 Several proceedings, duplicity

The validity of several distinct proceedings of an inferior tribunal relating to the same piece of property or subject matter may be presented by, and tested upon, a single petition.³⁹

2864 Under statute

In Michigan an affidavit for the writ of *certiorari* must raise all the questions of law which are to be presented in the particular case.⁴⁰

APPELLATE COURT JUDGMENT

2865 Petition requisites

A petition for a writ of *certiorari* to review a case decided by an appellate court should be entitled as, petitioner, v., respondent, and must contain a concise statement of the case and of the points and the authorities relied upon for reversal, without argument; it must be signed by counsel, by his or their individual name or names; and it must be accompanied by a copy of the appellate court's opinion, by the transcripts of the records of the trial and the appellate courts, authenticated by the seal of the appellate court and a certificate of the clerk, and by assignment of error written upon, or attached to the transcript of record of the appellate court.⁴¹

It is sufficient in a petition for a writ of *certiorari* from the supreme court to show probable error.⁴²

³⁷ Chicago v. Condell, *supra*.

³⁸ Clark v. Chicago, 233 Ill. 113, 114 (1908).

³⁹ Southworth v. School Board, 238 Ill. 192, 193.

⁴⁰ Booker v. Grand Rapids Medical College, *supra*.

⁴¹ Rule 42, as amended, 242 Ill. iv.

⁴² Aurora, Elgin & Chicago R. Co. v. Ruch, 243 Ill. 474 (1910); Rule 42, *supra*.

2866 Petitions

State of Illinois.

In the supreme court,

..... term, 19..

..... Petitioner, }

v.

..... Respondent. }

To the honorable, the judges of the supreme court of the state of Illinois.

Your petitioner,, presents this petition for a writ of *certiorari* in this cause, wherein respondent, on, recovered a judgment in the court of county for dollars, from which judgment petitioner prayed and prosecuted an appeal to the appellate court for the district of Illinois and assigned errors upon the record in said cause, which errors were, by the judgment of said appellate court, entered, held for naught and the judgment of the court affirmed.

Your petitioner, as grounds for relief in this court against said judgment, complaining says:

That error intervened in the judgment of the appellate court to the prejudice of your petitioner, for the reason that there was an accord and satisfaction between respondent and the, a joint tortfeasor, which, as a matter of law, released petitioner and was a bar to a recovery by respondent.

The action brought by respondent in the court was in tort against the and your petitioner, to recover for personal injuries received by respondent on the day of, 19.., in a collision between a train and a street car of petitioner's at the intersection of the tracks and the tracks of petitioner at; in which action petitioner's co-defendants were dismissed out of the case.

Said accord and satisfaction was established by the following testimony of respondent, in referring to his settlement with the, viz.: (Set out the questions and answers *verbatim*).

The foregoing is the only evidence in the record upon the issue here involved.

It was averred that the and your petitioner were joint tortfeasors. The proof was conclusive that if petitioner was liable the was a joint tortfeasor with petitioner.

Petitioner shows to the court here that the testimony above quoted, which is the same as that quoted by the appellate court in its opinion, precludes any idea that the claim was not fully settled by the payment of the dollars by the to respondent.

By reference to the opinion of the appellate court which is

appended to this petition, it further appears that it is conceded that an accord and satisfaction with one of several joint tort feorsors is a release of all and is a bar to an action against the others; that if the above testimony evidenced an accord and satisfaction with the, then the action was barred as to petitioner.

The question arises upon the record as a matter of law, because at the close of respondent's case, and again at the close of all the evidence, a written motion was filed for a directed verdict, which motions the court overruled, and written instructions were proffered therewith, which the court refused to give. To the adverse rulings of the court exceptions were duly preserved. In the motion for a new trial in the trial court these rulings were pointed out as ground for a new trial by points to, inclusive, and by point These points were specifically made in the assignment of errors in the appellate court, and are here again urged as ground for the issuance of the writ of *certiorari*.

Your petitioner therefore prays that the writ of *certiorari* issue conformable to the statute in such case provided.

.....
By
its attorney.

.....
Attorney for petitioner.
(Attach brief)

b

(Caption)

To the honorable, justices of the supreme court of the state of Illinois:

Now comes, petitioner in the above entitled cause, by, her attorney, and represents unto the court, that upon a hearing of a cause in court of county, Illinois, at the term, wherein this petitioner was the petitioner and was respondent, a judgment and order was entered in favor of this petitioner removing said as administrator of the estate of, deceased, and directing that the property be turned over to your petitioner.

Your petitioner further represents that said prayed for and perfected an appeal from said order and judgment of court to the appellate court for the district of the state of Illinois, and said appeal was submitted to said court at the term, 19.., of said court. That afterwards at the term, 19.., of said appellate court, to wit, on the day of, 19.., the said appellate court filed an opinion and rendered a judgment in said cause reversing the judgment and order of court.

Your petitioner therefore presents her petition that a writ of *certiorari* be granted to the appellate court of district of the state of Illinois in said cause, directing that said appellate court shall certify to the supreme court said cause for review and determination.

And for reasons therefor your petitioner would represent that said cause involves a question of such importance in relation to the administration of estates and the power and authority of the public administrator to act and the rights and powers of the heirs of a decedent who reside within the state, where there are no creditors, to adjust among themselves without the expenses attending an administration the rights of the several heirs in and to the property of the deceased, that in the decision of said cause it is necessary to place a construction upon sections 18 and 46 of the Administration act of the state of Illinois; and as said two sections had not been construed by the supreme court as relating to each other, a writ of *certiorari* should be granted in this cause and the same certified to the supreme court that said court may make such construction.

Your petitioner therefore prays that pursuant to the second paragraph of section 121 of "An act in relation to practice and procedure in courts of record," as amended by an act approved June 4, 1909, in force July 1, 1909, a writ of *certiorari* may be granted in this cause.

Respectfully submitted,

.....
Attorney for petitioner.

2867 Proof of service

(Caption)

We, the undersigned, attorneys for, plaintiff in the trial court and appellee in the appellate court, in the above entitled cause, have each this day received a copy of petitioner's petition for writ of *certiorari* and a copy of the abstract of record in the above entitled cause, about to be filed in this court upon application for writ of *certiorari* to the appellate court of the district.

Dated, etc.

.....
Attorneys for, respondent.

2868 Filing

Twelve copies of the petition, abstract, and proof of service of copies thereof upon the opposite party or his counsel, must be filed in the supreme court twenty days before the first day of the term.⁴³

⁴³ Rule 42, *supra*.

2869 Demurrer to declaration overruled, petition

State of Michigan, }
 county. } ss.

In the supreme court.

....., }
 Plaintiff, }
 v. }
 }
 Defendant and appellant. }

....., of, Michigan, being duly sworn, deposes and says:

1. Heretofore, on, to wit, the day of, 19..., a declaration composed of counts was filed as commencement of suit in the circuit court for the county of, state of Michigan, in which was plaintiff, and was defendant; a copy of which declaration is hereunto annexed, marked exhibit "A," and made a part hereof.

2. Thereafter, on, to wit, the day of, 19..., the defendant, the aforesaid company, by its attorney, filed a demurrer to each of the counts of said declaration in said cause, a copy of which demurrer is hereto annexed, marked exhibit "B," and made part hereof.

3. Thereafter, on, to wit, the day of, 19..., said cause having been brought on for argument before said circuit court for the county of, and before the honorable, judge thereof, said court having considered the issue thus joined between the parties, filed an opinion in said cause, a copy of which opinion is hereunto annexed, marked exhibit "C," and made part hereof; and an order was entered, in accordance with said opinion, in said cause in the journal of said court, overruling the demurrer to each of the counts of the declaration in said cause, and granting to said defendant leave to plead to said declaration within twenty (20) days, a copy of which order is hereunto annexed, marked exhibit "D," and made part hereof.

4. Deponent says that he verily believes that there is error in the order of the court so made as aforesaid, overruling the said demurrer to each of the counts of said declaration in said cause, so interposed by said defendant, and that the demurrer to each of the counts of the declaration should have been sustained by said court, and that said defendant was of right entitled to an order, discharging said defendant without day from each of the counts of said declaration, or if not to all of said counts, to at least certain of said counts, so filed by said plaintiff.

5. Deponent further says that each of the counts of said declaration, in the judgment of this deponent, do not contain or set forth facts sufficient in law to entitle said plaintiff

to a judgment against said defendant in said cause for the reason set forth in each of the demurrers to the counts of the declaration.

6. Deponent further says that in the opinion and belief of this deponent, there is error in the order of said court overruling each of the demurrers to the counts of the declaration, and that said demurrers should be sustained for the following reasons, to wit:

First count

First. For the reason that said count does not allege sufficient facts to constitute a cause of action in favor of the plaintiff and against the above named defendant.

Second. (State such other reasons as are necessary, and proceed with all the counts in the same manner)

Deponent further says that if the defendant, company, is compelled to plead to said declaration and to review the error so as aforesaid set forth by writ of error, great expense will be made to said defendant in the preparation and presentation of its defense in said cause, the same involving great labor in securing documentary proofs and testimony of witnesses.

Deponent further says that said defendant, company, acting hereunder by, its attorney, desires to review the proceedings aforesaid by writ of *certiorari* and this affiant is authorized to make this affidavit for and on behalf of the company, and this affidavit is made in support of the application for such writ.

Subscribed, etc.

.....

Attorney, etc.

2870 Habeas corpus proceeding

(Caption)

To the honorable judges of the supreme court of Illinois.

Your petitioner, the people of the state of Illinois, at the relation of, attorney general of the state of Illinois, and, state's attorney of the county of, state of Illinois, respectfully represent to the court:

1. That, on, to wit, the day of, 19...,, a resident of, county, Illinois, by her attorney,, filed in the court of county, in the state of Illinois, her petition for a writ of *habeas corpus*, praying that a writ of *habeas corpus* issue out of said superior court, directed to, warden of the Illinois state penitentiary, commanding him to bring the body of before the said

..... court and before honorable, one of the judges of said court, and to return into said court the cause and warrant for the detention and imprisonment of the said; that the said, for and on behalf of the said, averred, on oath, that the matters and things stated in the said petition were true; and that the said petition for writ of *habeas corpus*, so filed in the said court of county on the day of, 19..,, is in the words and figures following, to wit: (Set forth petition and exhibits).

That thereupon the said court of county, and the said, one of the judges thereof, acting wholly without jurisdiction in the premises, caused an order to be entered in said court of county, in the said cause of the people *ex rel.*, v., warden, etc., in the words and figures following, to wit:

“Let the writ of *habeas corpus* issue as prayed for, returnable before me, 19.., at .. M., without costs,, judge.”

3. That thereupon in pursuance of aforesaid order, the clerk of said court issued out of said court to the said, warden of the state penitentiary, at, Illinois, a certain writ of *habeas corpus*, which is in the words and figures following, to wit: (Set out writ).

4. That the said writ of *habeas corpus* has been duly served upon the said, warden of the state penitentiary, as aforesaid.

5. That the said, so alleged to be unlawfully confined in the said state penitentiary, at, Illinois, is the same who filed a certain writ of error in this honorable supreme court of Illinois, to the term, 19.., praying for a reversal of the judgment of the criminal court of county, finding him guilty of the offense of receiving stolen property in manner and form as charged in the indictment, which said conviction of the criminal court of county was by this honorable court affirmed on the day of, 19.., at the term, 19.., of this court, which said proceeding of conviction is the same proceeding of conviction from which the said seeks to be released by the aforesaid writ of *habeas corpus* and which is set out in the petition for said writ of *habeas corpus*, as will more fully appear by an inspection of the petition for said writ of *habeas corpus* and the record now here in this honorable court, in the aforesaid case of v. people, begun in the term, 19..

6. That the opinion of this honorable court, affirming said conviction, is found in Illinois, at page

7. That as appears by the records of this honorable court and by the averments of the said petition for a writ of *habeas corpus*, the said court of county, and

the said, one of the judges of the said court, did not have jurisdiction of the subject matter of the petition, and by the entry of the said interlocutory order commanding the said, warden of the said state penitentiary, to bring before the said court on the day of, 19.., the body of said, acted wholly without jurisdiction in the premises, and is about further to proceed without any jurisdiction in the premises, on the said day of, 19.., to pass upon the said petition for the writ of *habeas corpus* for the release of the said from said lawful imprisonment.

8. That there is no right of review by appeal or writ of error of the action of the said court of county, or the said, one of the judges thereof, upon *habeas corpus*.

Your petitioners, therefore, pray that the writ of *certiorari* be issued out of and under the seal of this honorable court to the said court of county, and the said, judge thereof, removing the said record and cause of the people of the state of, *ex rel.* v., etc., petition for writ of *habeas corpus*, the original petition and exhibits attached thereto, properly certified, and the original writ of *habeas corpus*, to this court, and that the hearing upon the said petition, the issuing of said writ and said proceedings, and record of the said court of county be quashed; and that your honors shall enter such further and other orders and take such further proceedings as shall to your honors seem meet and just in the premises.

Respectfully submitted,

.....

.....

Attorney general.

.....

State's attorney.

2871 Justice court proceedings; petition requisites, Illinois

A petition for a writ of *certiorari* to review a judgment alleged to have been unjustly obtained before a justice of the peace must state enough facts to fully and clearly show: (1) that the judgment was not the result of negligence in praying for the writ, (2) that the judgment is unjust and erroneous, (3) that it was not in the power of the petitioner to take an appeal in the ordinary way.⁴⁴ A mere showing of reasonable diligence to effect

⁴⁴ First National Bank v. Beresford, 78 Ill. 391, 392 (1875); Russell v. Pickering, 17 Ill. 31, 32

(1855); Par. 186, Hurd's Stat. 1909, p. 1405.

an appeal is insufficient.⁴⁵ Affidavits in support of or against the petition are not admissible.⁴⁶ A petition for a writ of *certiorari* to review a judgment unjustly obtained before a justice of the peace must be verified by the petitioner or his agent.⁴⁷

2872 Justice court proceedings, petitions (District of Columbia)

⁴⁸ Your petitioner,, enters at first his special appearance herein for the purpose of at first objecting properly to the rendition of any judgment herein because no jurisdiction has been obtained over his person in accordance with any act of Congress or otherwise, and respectfully represents as follows:

On he was handed what purported to be the "copy" of a summons issued by the honorable, justice of the peace, entitled "." v. ".," and which stated that he was summoned to appear in said justice court on at, to answer "plaintiff's demand for" Pinned to said "copy" was a paper dated ".," and reading "to for professional services to date" No other information was furnished him.

This application is not made for the purpose of delay, and this petitioner believes that he has a just and meritorious defense to the plaintiff's claim both in whole and in part, whatever said claim may be.

Wherefore, your petitioner prays that a writ of *certiorari* may issue commanding that the said cause be removed for trial into the supreme court of the District of Columbia, and for such other relief as may be proper.

.
Petitioner.

(Venue)

., being duly sworn, says that the foregoing allegations are true to the best of his knowledge and belief.

.
Subscribed, etc.

Let the writ issue as prayed.

Justice.

⁴⁵ *Waverly v. Kemper*, 88 Ill. 579, 581 (1878).

⁴⁶ *Davis v. Randall*, 26 Ill. 243, 246 (1861).

⁴⁷ Par. 186, Hurd's Stat. 1909, p. 1405; *First National Bank v. Beresford*, *supra*.

⁴⁸ Under the District of Columbia practice, the proceeding by *certiorari* to remove a case from a justice court is entitled in the supreme court the same as in a justice court, that is to say A B, plaintiff, v. C D, defendant.

b

(Caption)

The petition of respectfully shows to the court as follows:

1. That he is a citizen of the United States of America and a resident of the state of

2. That a suit has been recently instituted against him by, who is a citizen of, in the state of, and is now pending, unheard and undetermined, before, esquire, a justice of the peace, pending in the justice court of the District of Columbia, sub-district number, wherein the amount claimed by the plaintiff of this petitioner exceeds the sum of dollars, being, to wit, the sum of dollars, interest and costs.

3. That he is informed that this court has concurrent jurisdiction in said matter with the said justice of the peace, and petitioner elects to have said cause tried by this honorable court.

Wherefore this petitioner prays that this honorable court will issue a writ of *certiorari* directed to the said, esquire, justice of the peace as aforesaid, commanding him to transmit the record in said cause to this court for trial, and that he may have such other and further relief as the court may deem proper.

.....

Petitioner.

District of Columbia, ss.

I,, on oath say that I am the petitioner named in the foregoing and annexed petition for writ of *certiorari* in the case of against me instituted in the justice court of the District of Columbia, sub-district number; that I have read the said petition by me subscribed, and know the contents thereof; that the allegations therein set forth as of my personal knowledge are true, and those set forth upon information and belief, I believe to be true; that this petition is not made for the purpose of delay, and that I believe I have a just and meritorious defense to the plaintiff's claim in *toto*.

.....

Subscribed, etc.

Let the writ issue as prayed.

.....

Justice.

(Illinois)

(Caption)

To one of the honorable judges of the circuit court of the county of, in the state of Illinois.

Your petitioners, C D and E F, of the city of, county of, and state of, complaining show:

That A B, for the use of P, of said city of, on the day of, 19.., commenced an action of replevin, in a justice court of county,, before A D, justice of the peace, against A L, B L, B K, E F, C D and G, defendants; that the writ of replevin in said action was made returnable, 19.., at A. M. at the office of said justice of the peace at, in said county; and that said suit was brought to recover one trunk and its contents.

That afterwards your petitioners alone were served; that said cause was continued by said justice on said until, at A. M.; that upon said last mentioned date the cause was called; that the plaintiff was sworn and upon his evidence alone a judgment in trover was rendered against your petitioners for \$. and \$., costs of suit; that the plaintiff swore out immediate execution, which said justice then and there issued; and that a transcript of said judgment is hereto attached and made a part of the petition the same as though inserted at length in this place.

Your petitioners further show that they live at street, in the city of; that they are wife and husband; and that said justice's office is at, in said city of, the distance from their residence to said justice's office being a distance of miles.

Your petitioners further state that they are not and never have been indebted to said plaintiff and that they did not have and never did have any interest in said trunk and its contents, which are the only articles mentioned in the affidavit and writ of replevin.

Your petitioners further state that the defendant, C D, endeavored to assist a certain G, who was a sick lady at petitioners' house temporarily, waiting to go to by the road for the purpose of going to; that said G gave to your petitioner, C D, two expressman's baggage checks for her trunks at the depot; that your petitioner, C D, did, on or about the day of, 19.., go with such checks to the depot in said city of, at street, and checked the baggage represented by such checks; that said baggage was overweight, and your petitioner, C D, paid the charge for such overweight to the baggageman of said railroad at said depot; that said petitioner took such checks and such receipts, showing

payment for such overweight, back to her house and gave them to G, who, being sick, had remained at her house, street, during the time said baggage was so checked; and that said G took the night train on said day of, 19.., upon said road and made the journey to and then continued her journey from there to

Your petitioners further show that it appears that the expressman in giving G her baggage checks made a mistake and gave her one wrong check; that in consequence of such mistake, the trunk claimed by the plaintiff went upon one of such checks of G with her to; that such mistake was discovered by A B, the plaintiff; that said A B saw petitioner, C D, and explained to her what mistake had occurred and requested her to go with him to the telegraph office to send a cablegram in the name of your petitioner, C D, to G at, care of steamer, to have said trunk returned at once to; that said petitioner and said A B did go to said telegraph office and that a cablegram was sent as directed by said A B at his expense.

Your petitioners further show that in due course of time, to wit, on or about the day of, a bill of lading for said trunk was received by your petitioner by mail from; that in the meantime the police of the city of undertook to investigate said circumstances about said trunk; that when said bill of lading was received the fact was telephoned to a police officer of said city, J, and at his request; that the next day he came to the house of your petitioners and received said bill of lading for the purpose aforesaid; that after said police had made certain investigations which are unknown to your petitioners, they attempted to send said bill of lading back to your petitioner, C D, by mail, but that in some manner said bill of lading was left in the postoffice in consequence of a misdirection, it being addressed street, instead of street,, as it should have been; that thereupon said A B came to petitioners' house and your petitioner, C D, told him the above circumstances about the bill of lading, except the fact that said bill of lading had been delayed in the postoffice, which was then unknown to her; that thereupon said A B returned the following day with a summons in said cause and a letter from inspector to deliver to him said bill of lading.

That thereupon your petitioner, C D, went personally to see police officer J, who told her that he had mailed the bill of lading, but that he would go to the postoffice and trace it up; that the following morning he did go to the local postoffice at and streets; that he found said bill of lading there and brought it to said petitioner and then accompanied her to meet A B at the express office, in said city of, where they met A B and C G; that they all went to the United States Custom House in said city of,

where C D signed all necessary papers for said plaintiff to get his trunk; that said trunk was delivered to said A B and C G; that then and there, after said A B had received said trunk at said Custom House, he said to C D, "That is all I want of you;" and that thereupon your petitioner, C D, asked officer J to ask said A B if she should give any further attention to said suit, and said A B replied that it would need no further attention, and that she need not appear before said justice.

Your petitioner further says that since said judgment was rendered and about two months ago, she, at the request of said A B, went with him to the Custom House in and signed vouchers upon which he recovered \$. rebate duty charged upon said trunk in her name; that said A B upon such occasion made no mention of having obtained any judgment in the suit as aforesaid; and that your petitioner supposed that no judgment had been in fact obtained.

Your petitioner, E F, shows that he is an architect having his office room No.,,; and that the constable having such replevin writ served him at his office under the following circumstances: that when your petitioner understood what it was, he told the constable that his wife was then with A B causing said trunk to be recovered by said A B at the express office; that the officer said: "If that is the case, I'll go over there," leaving your petitioner to believe that the delivery of the trunk would discontinue any proceedings against your petitioners.

Your petitioner further shows that in no way, shape or manner is he connected with or interested in said trunk, and that he knew nothing about it except what information he gathered from his said wife.

Your petitioner further shows that his wife told him what was said aforesaid, that they need not appear before said justice, and that he relied upon such statement.

Your petitioners further show that they are in no way indebted to said plaintiff and that they have detailed all the circumstances upon which any possible cause of action could be based by said plaintiff against both or either of them.

Your petitioners further show that they did not go to said justice's office because they had no knowledge that any judgment had been rendered against them until quite lately and long after the time for an appeal had expired.

Your petitioners further show that although said plaintiff took out an immediate execution, that it had never been served upon them and that they only learned accidentally through said officer J that a judgment had, in fact, been rendered against them.

Your petitioners further show that they relied upon said statement of said plaintiff made to said officer J that they need not appear in said justice court, that said suit would be dismissed by said plaintiff, and that it would not be prosecuted

by said plaintiff; that they have been guilty of no negligence whatever; and that said judgment is entirely erroneous and unjust.

Your petitioners therefore pray a writ of *certiorari* to remove said cause from before said justice into the said circuit court according to the statute in such case made and provided.

.....

 Petitioners.

.....
 Petitioners' attorney.

(Verification)

To the clerk of the circuit court:

Let the writ of *certiorari* issue upon the petitioners' giving bond in the penal sum of \$.

Dated Judge.

b

(Caption)

Your petitioner,, of the city of, respectfully sheweth unto your honor that about the day of last past, he was summoned to appear before, esquire, a justice of the peace in the city of, in a number of cases, as your petitioner believes, four or five, to answer as garnishee of one, at the suit of divers persons as plaintiffs, in one of which said suits was plaintiff; that your petitioner appeared and answered that he was in no way indebted to the said, and was discharged as such garnishee; that very soon thereafter your petitioner was called to the state of upon business, and was absent in for several days, and immediately upon his return therefrom went to another state, to wit,; that including his absence to, he was away from for several weeks; that his business was such as to make it very necessary for him to be away from, and gave him no opportunity to attend business here; that since his return to he was presented with an execution for the sum of dollars damages, and dollars costs, issued upon a judgment rendered against him on the day of, last past, in favor of said; that said judgment was rendered by said justice, upon the failure of your petitioner to answer as garnishee of said as he now learns from the docket of said

And your petitioner further sheweth, that it appears that there were two writs of summons served upon him as gar-

nishee of said , and in favor of said
; that he answered when summoned, as to one at the
 same time with several others, the names of whom he does
 not now remember, but failed to answer as to the other sum-
 mons in favor of said; that being then dis-
 charged by said justice, this petitioner did not suppose that
 it was required of him to answer any further, or more fully,
 and gave the matter no more attention until an execution
 was presented to him, and it was too late to answer or appeal
 from said judgment.

And your petitioner further showeth, that he had no notice,
 knowledge, or suspicion that he was obliged or required again
 to answer, or that judgment would or had been entered against
 him for want of an answer, that he owed said
 nothing, and has nothing belonging to him in his possession,
 or under his control; that on the contrary thereof the said
 owes your petitioner dollars, and
 which your petitioner is unable to secure or collect.

Wherefore, as your petitioner has had no opportunity of
 appealing said suit, he prays for a writ of *certiorari* to bring
 the same before your honor; and he therefore says, that he
 has a good and valid defense to the whole of said action on the
 merits, etc.⁴⁹

.....
 Petitioner.

(Verification)

c

(Caption)

To the honorable , judge of
 court of county:

Your petitioner, , of the city of ,
 county of , and the state of ,
 respectfully represents and shows unto your honor, that he
 is a citizen of the state of , and that he is the
 owner of large tables of the value of dol-
 lars; that until on or about the day of , 19.. ,
 said tables were in the premises known as number
 street, in said city of; that
 on, to wit, the day of , 19.. , aforesaid,
 went before , Esq., a justice of the
 peace in and for the town of , and made com-
 plaint for a search warrant, a copy of said complaint being
 hereto annexed and marked "exhibit A," and made a part
 of this petition; that the said thereupon act-
 ing as such justice of the peace and , Esq.,
 also a justice of the peace in and for said town, did then and
 there issue a certain warrant under the hand and seal of the

⁴⁹ McNERNEY v. NEWBERRY, 37 Ill.
 19, 92 (1865).

said and, justices aforesaid, a copy of said warrant being hereto annexed and marked "exhibit B," and made a part of this petition; that said warrant, upon being so issued, as aforesaid, was delivered to , a police officer of the city of , who on or about the night of the day last aforesaid, went to the premises, street, with divers other police officers unknown by name to your petitioners, acting under and by virtue of said pretended warrant, and then and there took and carried away said tables, said making the following return upon said search warrant: "Executed this writ by searching the within mentioned premises and crap tables found., police officer." And the said , took said tables before the said , justice as aforesaid.

Petitioner further shows unto your honor that no summons or other writ has been served upon him in reference to any trial or proceedings in relation to said property and that he had no notice whatever of any legal proceedings in relation thereto.

Petitioner further shows unto your honor, that upon said tables being taken before the said , the said , acting as a justice, found and adjudged the property so before him seized upon said search warrant to be gambling implements and ordered the same destroyed. Your petitioner annexes to his petition a transcript of all the proceedings in relation to said property and said search warrant had before the said and makes said transcript a part of this petition.

Petitioner avers that said proceedings before said justice were oppressive and unwarranted by law; that said justice had proceeded illegally and without jurisdiction; and that said proceedings are in violation of the constitution of the United States and of this state.

Petitioner further avers that so far as he is informed the law under which said search warrant was issued and said proceedings were had does not provide for any trial or any opportunity for petitioner to be heard before the entering of an order by said justice to burn or otherwise destroy said property, and that your petitioner cannot appeal from such order of such justice of the peace, and petitioner is wholly without remedy to set aside and annul said proceedings before said justice save by an order of your honor to allow a writ of *certiorari* as at common law to be issued in due form directing and commanding the said record and proceedings in that behalf to be brought before your honor; and your petitioner prays that said proceedings be set aside.

Your petitioner therefore prays that an order may be issued for the common law writ of *certiorari* to remove said cause from before said justice of the peace, and that petitioner may

have said proceedings set aside and declared as wholly void and of no effect.

.....
Petitioner.

.....
Attorneys for petitioner.
(Verification)

Complaint for search warrant

(Venue)

....., being duly sworn, says that the premises known as number street, in the city of, in said county, is a place resorted to for the purpose of unlawful gaming, and that there is concealed in the rooms, closets, vaults and safes of said number and street, gaming apparatus and implements used, kept and provided to be used in unlawful gaming, to wit, one faro table, one roulette table and wheel, poker tables, chips, cards, and all gambling implements and devices at said premises.

Affiant further says that said premises are occupied by parties unknown.

This affidavit is made to obtain a search warrant for said gaming apparatus and implements.

Subscribed, etc.

Search warrant

(Venue)

The people of the state of Illinois, to the sheriff or any policeman or constable of said county, greeting:

Whereas, has this day made complaint on oath before the undersigned, the justices of the peace of said county, that the premises known as number street, is a place resorted to for the purpose of unlawful gaming, and that there is concealed in the rooms, closets, vaults and safes of said number street, gaming apparatus and implements used, kept and provided to be used in unlawful gaming, to wit: one faro table, one roulette wheel and table, poker tables, cards, chips and all gambling implements and devices on said premises, and that said premises are now occupied by parties unknown.

We therefore command you, with necessary and proper assistance, to enter in the day time or night time into the said premises and their diligently search for said gaming apparatus and implements, and if the same or any part thereof be found upon such search, that you bring the apparatus and implements so found before the said justices to be disposed of according to law.

Witness. (Two justices, etc.)

Return

At number street.

Executed this writ by searching the within mentioned premises and two crap tables found, this day of, 19..

.....
Police officer.

(Mississippi)**(Caption)**

Your petitioner, the undersigned, would respectfully state the following facts, to wit: that some time in he borrowed from and later on he paid on said account and then borrowed dollars and paid out of this sum the former loan, and did on and at the same time execute a note and deed of trust given as security (Describe nature of same); that since the execution of said deed of trust your petitioner failed to make the payment of said amount when due and the said brought suit in a justice court before in said district and county returnable on the day of, 19..; that the officer did not require any bond but permitted your petitioner to retain possession of said property; that before the court day your petitioner went to see the plaintiff in this suit and compromised with him by paying dollars down and agreeing to pay the cost of the court, and the said plaintiff agreeing to withdraw said suit; that upon this agreement on the part of the plaintiff your petitioner did not attend court, but relied upon his promise to withdraw said suit.

Your petitioner alleges that the plaintiff on said court day, as he is informed, took judgment against your petitioner for the property sued for; and on the plaintiff agreed to wait, on your petitioner paying dollars more; whereupon the petitioner paid said last mentioned sum, being the last day in which to prosecute an appeal; that since then, on the day of, the said has taken possession of petitioner's for the satisfaction of the balance due as aforesaid.

Your petitioner alleges that the judgment is void for the reason that the trustee in said deed of trust should have been made a party plaintiff and not the beneficiary, and that the judgment is defective further in not fixing the valuation of said property and in not having been rendered in the alternative form, that is to say plaintiff to recover the property, to wit,, valued at, or the defendant to pay the balance due on said property, or the property

to be sold to satisfy the balance, and any balance remaining after paying the debt secured to be paid to defendant.

Wherefore, your petitioner prays that a writ of *certiorari* may issue direct to said, a justice of the peace, who rendered the judgment for same.

Sworn, etc.

(Venue)

To the clerk of said court:

You will issue writ as prayed, upon petitioner entering into bond to be approved by you in the penal sum of dollars conditioned as provided by law.

Witness my signature this, etc.

Circuit Judge.

b

(Caption)

To the honorable, judge of judicial district of the state of Mississippi.

Your petitioner, the, a corporation organized and authorized under the laws of the state of Mississippi, domiciled and doing business in the city of, county, respectfully shows unto your honor the facts following, to wit:

That on the day of, 19.., plaintiff herein caused an attachment to be issued against the estate, real and personal, of the said, upon an affidavit filed with, a justice of the peace of, of said county, and that bond was given as by law required, in which said affidavit a suggestion of garnishment was made against your petitioner, upon which suggestion a writ of attachment was issued on the date aforesaid and served upon the (cashier) of your petitioner requiring it to make answer as by law directed.

That on the day of, 19.., the return day of said writ of attachment and garnishment, your petitioner filed its answer under oath therein averring that he did not owe the defendant any sum whatever, a true copy of said answer being herewith filed marked exhibit "A" and made a part hereof. That said answer did contain a statement to the effect that your petitioner had received certain invoices for collection merely, and that the same had been forwarded to the debtors, your petitioner only kept a memorandum of the same upon its books.

Your petition further avers that it has never received any collection on any of the invoices mentioned in its answer and

now has no funds of the defendant, nor did it have any at the time of the service of the writ, nor has it had any since that time.

Your petitioner shows that the said cause was tried in said justice court and resulted in a judgment against the defendant for the sum of dollars which your petitioner thought and believed was a personal judgment against the defendant alone. That said judgment was not then and there entered up but was entered up several days after the rendition of the same and after being prepared by plaintiff's attorney without the knowledge of your petitioner.

That contrary to your petitioner's advice and belief about said judgment, the same was a judgment against your petitioner for the sum aforesaid without any limitation or qualification whatever, as well as against the defendant.

Your petitioner shows to your honor that plaintiff herein threatens to cause execution to be issued against your petitioner for the sum aforesaid and to cause your petitioners needless expense and trouble. Your petitioner is advised and believes that said judgment against it is unfounded and unwarranted under the law from the facts set forth and contained in your petitioner's answer. Further petitioner here states to your honor that it would be unfair and unjust to have to pay the judgment against it when in truth and in fact its answer disclosed that it held no funds of the defendant nor does it now, nor has it at any time since the filing of said answer.

Wherefore, the premises considered, your petitioner prays that your honor grant it the state's most gracious writ of *certiorari* directed to, justice of the peace, commanding him to forthwith send up all the papers in said cause to the next term of the circuit court of county in order that said judgment may be modified and corrected according to the facts, and that summons issue to accordingly.

.....
By, Cashier.

.....
Petitioner's attorneys.

2873 Roads, proceeding to lay out

(Caption)

To the honorable, judge of the judicial circuit, in and for said county of, Illinois.

Your petitioner,, a resident of the town of, in said county, and a tax-payer therein, would represent unto your honor:

That he is the owner in fee simple of the (Insert legal description) in said county.

That on the day of, 19.., a copy of a petition for a public highway was received by the road commissioners of said town, as they allege in their final order locating the highway hereinafter described, signed by the requisite number of legal householders residing within miles of said proposed highway.

That said petition prayed for the location of a public highway in said town as follows, to wit: commencing at a point (Insert legal description), in the township and range aforesaid.

That upon the day of, 19.., said commissioners caused notices to be posted of the receipt of said petition, and fixed the day of, 19.., at the hour of o'clock of that day at the house and residence of, to examine the cost of such proposed road and to hear reasons for and against laying out the same. Said notices were purported to have been posted by, but your petitioner charges the fact to be that the proof of such posting as appears by a purported affidavit of said is not sufficient to show that three copies of such notices were posted as required by law, and that said affidavit of such posting is void for uncertainty.

That on the day of, 19.., said commissioners caused a survey to be made of said proposed highway and ordered that in their opinion said proposed road was a public necessity, but your petitioner claims the fact to be that said order or the final order herein does not state where said commissioners decided to lay out said road except inferentially, by saying that they caused a survey to be made on the day of, 19..

That said road was located wholly on the lands of your petitioner, that your petitioner refused to participate in any of the proceedings to locate said highway, that he refused to make any agreement as to damages, believing that the proceedings in locating said highway were illegal and void, that in the opinion of your petitioner the petition, notices, certificate and all other papers wherein said purported highway is described are illegal and uncertain in the description of said road, as your petitioner is informed and believes.

That on the day of, 19.., a certificate was presented to, a justice of the peace in and for said county, asking for the selection of a jury; that on said last mentioned day said justice issued a *venire* for a jury to assess the damages of your petitioner to meet at his office on the day of, 19..; that said jury consisted of six jurors, as will more fully appear by reference to the return of said justice hereto; that said justice issued a summons to your petitioner, a copy of which is hereto attached and marked

exhibit "A," and made a part of this petition; and your petitioner would charge the fact to be that, being informed and believing that said summons was void, he did not enter his appearance before said justice and jury on the return day of said writ, but that his counsel,, entered a special appearance to move to quash said writ and for no other purpose; that neither your petitioner nor his counsel nor any person for him entered a general appearance for your petitioner, nor agreed to a continuance, nor took any part in the assessment of damages by said jury or the selection of said jury.

That by the law then in force a petition had to be posted days before any action could be taken on the same, that other proceedings were to be had, all of which must affirmatively appear in the final order of said commissioners to have been done.

Your petitioner would respectfully charge the fact to be that said purported road is not a legal highway because said commissioners did not meet as required by law. That the final report of said commissioners fails to show that when said commissioners concluded to lay out said road a public announcement of such conclusion was then made as required by law. That the summons issued to your petitioner to appear before said justice on the question of damages was void in this that it was directed to your petitioner and not to any officer, nor did said summons run in the name of the people of the state of Illinois, as required by the constitution of said state. That said final order does not affirmatively state when said commissioners posted notices for their meeting to hear reasons for and against said road, nor does said final order show the dates of the posting of notices of their final meeting, as required by law; that their final meeting was not within the time required by law. That the commissioners of highways of said town threaten to open said highway, having given your petitioner a notice to remove his fences. That said commissioners have instituted suit before a justice of the peace of said town to recover a fine of this petitioner for not opening said road. That said suit is set for the day of, 19.., and said commissioners will proceed with said cause, if said writ is not issued, said suit is brought before said defendant That said commissioners have not tendered to your petitioner the amount of such damages.

He therefore prays that a common law writ of *certiorari* be issued under the seal of this court to said commissioners of highways, as such commissioners, said commissioners being and, as the town clerk of said town, and the said justice before whom said damages were assessed, to certify to this court all the orders and proceedings in locating said highway; that upon inspection of the papers pertaining to said purported highway, the court will order that the proceedings and orders made by the com-

missioners and said justice relating to said highway be vacated and annulled; and that the writ of *certiorari* operate as a *supersedeas* restraining the opening of said highway or proceeding to sue for the penalty for refusing to open said purported road and from proceeding to trial of said suit wherein said commissioners are plaintiffs and your petitioner is defendant.

.....
Petitioner.

.....
Attorney for said petitioner.
(Verification)

Order

Let a common law writ of *certiorari* issue according to the prayer of the foregoing petition on the petitioner filing bond in the sum of dollars with surety payable to the defendant and conditioned as the law directs.

.....
Judge.

To
Clerk, circuit court of
county, Illinois.

2874 Roads, surveyor's removal

(Caption)

To the honorable, judge of the circuit court of county, West Virginia.

Your petitioner,, most respectfully represents that he is, and has been for a number of years, a citizen and tax-payer in district, county, West Virginia, residing in said district, county and state aforesaid, that he is a legal voter and eligible to office in said district, county and state aforesaid, and has been for several years past.

Your petitioner further represents that for a number of years under the appointment of the county court of county, a body corporate under the laws of the state of West Virginia, and which body has the power of making such appointment, he has been surveyor of roads for precinct number in said district, and that under his original appointment his term of office as such surveyor of roads expired, and on the day of, 19.., said county court reappointed him as such surveyor of roads, for a period of years from that date, which appointment was made of record and entered in the order book of said court, but said order by error shows that the number of the precinct as num-

ber when in fact it is number, see copy of said order herewith filed as a part hereof, marked petitioner's exhibit "No. 1."

That immediately after said appointment of, 19.., your petitioner immediately took the oath of office and proceeded with the duties of said office, and has performed the same ever since, and as will be seen from said order of said court his term of office as such will not expire until the day of, 19.. That the county court of county is now and was on the said day of, 19.., composed of,, and, and on said date said county court of county entered an order whereby they attempted to remove your petitioner as such surveyor of roads for said precinct number in district in said county, and appoint in his place and stead one, a nephew of the said, see copy of the order by which said attempted removal and appointment is attempted to be made, herewith filed as a part hereof, marked petitioner's exhibit "No. 2."

That in pursuance of said order the said immediately appeared before the clerk of said court, while said court was still in session, and gave the bond required by said order, and which bond was approved by the clerk of said court, and took the oath of office as required by said order, and thus attempted to qualify as surveyor of roads for said precinct in the stead and place of your petitioner.

That said attempted removal of your petitioner was without any charges having been preferred against him and without notice to him, or a hearing of any kind or character, and that so far as petitioner is informed there was no reason why he should have been removed from said office, but said action was taken by said court upon its own motion, and without any opportunity to the petitioner to be heard as to its action in the premises.

Your petitioner now here avers that he has at all times faithfully and well performed the duties of his said office of surveyor of roads and is ready and willing and desires to continue to do so during the term of his office.

That under the laws of the state of West Virginia, having been duly appointed as such surveyor of roads, he was compelled to serve as such or be subject to a fine as provided by law.

That the appointment of this petitioner to said office vested in him the right to said office and the emoluments thereof as provided by law for and during the term of his appointment, and that he could not be deprived of the same except for sufficient grounds and in accordance with law, and that he has a right to enjoy the same until his said term would expire, and he now insists upon his right to do so.

Petitioner represents that he is and was prejudiced by the

said order of the said county court entered on the day of, 19.., whereby it attempted to remove him from said office and deprive him of the same and the emoluments thereof, and that he has a right to have said action of the court reviewed, and he says the following errors were committed by said court, to wit:

1. It was error to enter an order removing this petitioner, without charges having been first preferred against him, and without notice to him of the charges;

2. It was error to attempt to remove this petitioner and appoint the said, or any person, in his stead, without charges having been first preferred, notice thereof given, and an opportunity to be heard;

3. It was error in said court to take the action it did without having charges been preferred, notice given to petitioner and a hearing upon the charges;

4. That the entry of the order of, 19.., was an attempt to deprive this petitioner of his right to said office and the emoluments thereof, without due process of law;

5. That the entire action of the said county court was in violation of law and without the scope of its authority and power, in the manner in which said order was entered, and

6. And for other errors appearing upon the face of said proceedings.

Your petitioner therefore prays that a writ of *certiorari* may be awarded him, directed to the said county court of county, West Virginia, commanding it to bring into this court its records and proceedings in this matter, and that when so brought before this court, that the said be duly notified of this proceeding, and that the action of said county court in entering said order of, 19.., be reviewed, reversed and set aside, and held for naught, and that such other and further relief may be granted this petitioner in respect thereto as may be meet and proper, and as in duty bound he will ever pray, etc.

.....
Petitioner.

.....
Counsel for petitioner.

(Venue)

....., the petitioner named in the foregoing petition, being duly sworn, says that the facts and allegations therein contained are true, except so far as therein stated to be on information, and that so far as they are therein stated to be upon information, he believes them to be true.

.....Petitioner.

Taken, sworn to and subscribed before me this day of, 19..

.....Notary Public.

Order

(Caption)

This day,, by his attorney, presented a petition for a writ of *certiorari* to remove into the circuit court of county the record and proceedings of said county court, whereby by a certain order entered by said county court on the day of, 19.., it attempted to remove said petitioner as surveyor of roads for precinct number in district, in said county of and appointed one in his stead, and which petition is verified by the oath of the petitioner.

And it appearing that said order of said court is a final order, and that the same involves the title to an office and the emoluments thereof, and that said order should be reviewed by the circuit court of county, a writ of *certiorari* is awarded to be directed to the county court of county, commanding it to certify and return under its seal a complete record of all orders and proceedings before it, together with any evidence taken by it, as fully as they are now before said county court, to the judge of our said circuit court, at the court house thereof, on the first day of the term, 19.., of said court; and bond in the penalty of \$....., payable to the state, with conditions that said petitioner shall pay all such damages as may be suffered to said county court or the said, and pay all such costs and damages as may be awarded against the petitioner, may be filed by said petitioner, or someone for him, with the clerk of this court, with security to be approved by said clerk, if said petitioner desire said writ to operate to suspend said order of, 19..

.....
Judge of the circuit court,
county, West Virginia.

To, Esq.,
Clerk circuit court,
county, West Virginia.

BOND

2875 Mississippi

(Venue)

We,, as principals, and, as sureties, agree to pay to, plaintiff in a suit of against, principals herein, the sum of dollars unless the said will prosecute his writ of *certiorari* with effect in the circuit court and pay such costs, or otherwise, that may be adjudged against him.

Witness our signatures this, etc.

(Signatures and seals)

Approved this, etc.

2876 West Virginia

Know all men by these presents, that we, and
, are bound unto the state of West Virginia, in
 the penalty of dollars, for the payment of which we
 bind ourselves, jointly and severally.

Witness our signatures and seals, this the day of,
 19..

Whereas, the above bound has been by the
 judge of the circuit court of county, West
 Virginia, in vacation, awarded a writ of *certiorari* to remove
 into the said circuit court of county the record
 and proceedings of the county court of said county, in the mat-
 ter of appointing one surveyor of roads for
 precinct number in district, said county
 of, by an order entered by said county court,
 on, 19..

Now, if the said shall pay all such damages
 as may be suffered to said county court or the said
, and pay all such costs and damages as may be awarded
 against him, then the above obligation to be void; otherwise
 of force.

(Signatures and seals)

Acknowledged and approved, this the day of,
 19..

.....
 Clerk.

WRIT

ILLINOIS

2877 Writ unnecessary

In a proceeding under the statute for a writ of *certiorari* to
 review a judgment which has been unjustly and without a party's
 fault obtained before a justice of the peace, the actual issuance
 of the writ is unnecessary, if a complete transcript of the pro-
 ceedings before the justice is filed without the writ. In this kind
 of a proceeding, the trial is *de novo* and the circuit court acquires
 jurisdiction, not by return of the writ, but upon the filing of the
 petition for the writ, the endorsement of an order thereon, and
 the clerk's approval of a bond.⁵⁰

⁵⁰ Gallimore v. Dazey, 12 Ill. 143,
 144, 145 (1850).

2878 Writ

State of Illinois, }
 county. } ss.

In the court of county,

To the term, 19..

The people of the state of to
 justice of the peace in and for the town of, greeting:

Whereas, it has been represented to the honorable
, one of the judges of the court of the
 aforesaid county in the state of Illinois, by petition and affi-
 davit (verification) of, exhibited before the
 said judge on the day of, 19.., in and by which
 said petition it is alleged that certain errors and manifest ir-
 regularities have intervened in certain proceedings had before
 you as justice of the peace, aforesaid, and that said proceed-
 ings are illegal and void, and the said judge upon the inspec-
 tion of said petition made an order upon the said petition di-
 recting the issuance of a writ of *certiorari* as at common law
 against the said therein named in pursuance
 of the prayer of said petitioner for the re-examination of the
 proceedings in connection with the matter aforesaid, we there-
 fore command you, the said, justice of the
 peace, as aforesaid, that you do certify and bring the record
 of your proceedings in and about or concerning the complaint
 and search warrant issued by you in reference to the premises
 known as number street and that you bring
 and produce the said records and papers into our said
 court, before the honorable, at the
 term, 19.., to do and receive what the court shall
 order in connection therewith.

Witness (clerk, etc.).

b

(Venue and court)

The people of the state of Illinois to the trustees of schools of
 township, range, and the trustees of
 schools of township, range, county clerk
 of county, and, county clerk of
 county, greeting:

Whereas, it has been represented to the honorable
, judge of the judicial circuit of the state of
 Illinois, and sole presiding judge of the court
 of county, in the state aforesaid, by affidavit
 and the petition of, of the county of,
 exhibited before the said judge, at his chambers, upon the
 day of, 19.., in and by which said petition it is al-

leged that certain errors and manifest irregularities have intervened in certain proceedings of the trustees aforesaid, in and about the consolidation of school district No., in township, range, in said county, with school district No., in township, range, in said county; and the said judge, upon inspection of the said petition, made an order upon the said petition, directing the issuance of a writ of *certiorari*, as at common law, against the defendants therein named, in pursuance of the prayer of said petition, for the re-examination of the proceedings of the parties aforesaid in connection with the consolidation of the school districts aforesaid;

We, therefore, command you, the said trustees of schools of township, range, and you, the said trustee of schools of township, range, that you, and each of you, respectively, do certify and bring the record of your proceedings in, about or concerning the consolidation of the school district aforesaid; and that you, the said, county clerk as aforesaid, and you, the said, county clerk as aforesaid, and each of you, respectively, certify and bring all records or papers being or remaining in your offices, respectively, connected with or concerning the consolidation of the school districts aforesaid; and that you, the said trustees of schools, and each of you, respectively, and you, the said, clerk as aforesaid, and said, clerk as aforesaid, and each and all of you, bring and produce the said records, papers and files aforesaid, into our said court, on the first day of the next term thereof, to be holden at the court house in the city of, in the said county of, on the in the month of 19.., next hereafter, and to do and receive what the court shall order in connection therewith.

Witness (clerk, etc.).

To the sheriff of county, to execute.⁵¹

c

(Venue and court)

The people of the state of Illinois, to the commissioners of highways of the town of, in the county of, and state of Illinois, and the town clerk and, as a justice of the peace.

Whereas has presented to the honorable, judge of the judicial circuit of the state of Illinois, his petition alleging certain illegalities in the record and proceedings of a certain road attempted to be laid out in said town of, and described as follows, to wit:

⁵¹ Miller v. School Trustees, 88 Ill. 31.

Commencing at a point (Insert legal description) in the township and range aforesaid.

Now, therefore, you are hereby required and enjoined to certify to the circuit court of said county of, at the term thereof, to be holden at the court house in, on the day of, 19.., a complete record of the proceedings in relation of the laying out of said road, and that you suspend all proceeding in relation thereto in opening said highway or proceeding to sue for the penalty for a refusal to remove the fences from the same until the said circuit court shall make order to the contrary.

Here fail not, under penalty of the law.

In testimony whereof, etc.

To the sheriff of said county to execute.

2879 Return unnecessary, when

In *certiorari* to review a judgment which was unjustly obtained before a justice of the peace, the writ is addressed to the sheriff, who is not required to make a formal return of it.⁵²

2880 Return requisites

In *certiorari*, the return of an inferior tribunal must show the various facts from which it can be seen that it had jurisdiction over the subject matter.⁵³

2881 Return, judge's

(Caption)

Now comes, judge of the court of county, in his own behalf, and on behalf of said court of county, and doth make return to the writ of *certiorari* served on him in the above cause and transmits herewith the original petition for *habeas corpus* mentioned in said writ, heretofore on file in the clerk's office of said court with the endorsement and order thereon and a certified copy of the writ of *habeas corpus* with return thereon issued and on file in said court under the hand of the clerk and the seal of the court, to the court of Illinois, pursuant to the command of said writ of *certiorari*. Said petition and writ being all of the files in said cause in the court and no orders appearing of record therein except a memorandum order continuing said cause to, 19.., and one reciting the service of *certiorari* and withdrawal of the original

⁵² Gallimore v. Dazey, *supra*.

⁵³ Southworth v. School Board, 238 Ill. 197, 198.

petition from the files for transmission to the said supreme court.

Witness my hand this day of, 19..

.....
For himself and said
court.

(Attach record of proceedings)

MICHIGAN

2882 Circuit court commissioner, writ and return

The people of the state of Michigan, to, circuit court commissioner within and for the county of, greeting:

We being willing for certain reasons that the supreme court of the state of Michigan should be certified what complaints are levied or affirmed before you against, at the suit of and, do therefore command you, that all and singular the said complaints together with all things touching the same by whatever name the parties may be called before you, you distinctly and openly send to the supreme court of the state of Michigan before the justices of the said supreme court at the court room in the city of Jackson, on, the day of, 19.., then that the said court may cause to be done thereupon what of right and according to law should be done.

Whereof fail not and have you then and there this writ.

Witness the honorable, chief justice of the supreme court at, this day of, 19..

.....
Clerk of the supreme court.

(Seal)

Return

⁵⁴ To the justices of the supreme court of the state of Michigan:

The return to this writ appears by the schedule hereto attached. The answer of the circuit court commissioner within named.

.....
Circuit court commissioner of
..... county, Michigan.

⁵⁴ Endorse this return on back of the writ.

Schedule

The return of, circuit court commissioner within and for the county of, to the writ of *certiorari* hereto annexed.

State of Michigan, }
County of } ss.

To the honorable, the supreme court of the state of Michigan.

In pursuance of the writ of *certiorari* of the people of the state of Michigan hereto annexed to me directed and heretofore delivered, and in obedience thereto, I, one of the circuit court commissioners within and for the county of, as to the complaints that are levied or affirmed before me against, at the suit of and, and all things touching the same, etc., by the said writ mentioned and intended, do hereby certify and return as follows, that is to say:

That heretofore, on the day of, 19..., the said applied to me for a dissolution of an attachment by virtue of a writ of attachment sued out of the circuit court of the county of, on the day of, 19..., by said and, against the goods, chattels and tenements of said which application was in writing and is in words and figures following, namely (Insert application). Upon the presentation of which application I issued a citation to the plaintiff in said attachment; which citation was in the words and figures following, namely (Insert citation).

That afterwards and on the said day of, 19..., at o'clock in the noon, at my office in the city of, in said county, the said parties appeared, the said by, his attorney, and the said and, by their attorneys, before me as commissioner, in pursuance of said citation, and not being ready to proceed to the hearing of the matters arising thereupon, the same was adjourned and I then and there appointed the day of, 19..., at o'clock in the noon, at my office aforesaid, as the time and place for said hearing, by and with the consent and agreement and at the request of said parties without prejudice to either party.

That afterwards and on the said day of, 19..., at o'clock in the noon, at my office aforesaid, the said parties appeared as aforesaid in pursuance of said adjournment and appointment.

And the counsel for the said plaintiffs, and, then and there admitted due service upon them of the said citation.

And thereupon the counsel for the said and

..... did then and there interpose and state divers objections to said application of, aforesaid, and to said proceedings before me, commissioner as aforesaid, as follows:

First, that the application to dissolve an attachment is to be made by petition and that this application is not a petition and does not propose to be one.

Which objection, after hearing argument of counsel thereupon in support thereof and in opposition thereto respectively, I did then and there overrule (Or which objection after hearing counsel, etc., I did then and there reserve for further consideration).

(Proceed in the same manner with all objections)

And the counsel for the said defendant,, then and there admitted that he, the said counsel, served notice of the appearance of, and his retainer for, the said defendant in said attachment suit upon the said counsel for the said plaintiffs therein on the day of, 19., and that the said writ of attachment was not personally served upon said defendant.

And the said parties being then and there ready to proceed to a hearing of the matters arising upon the said citation aforesaid, I did then and there proceed to hear the proofs and allegations of the said parties in relation thereto.

Thereupon the said counsel for the said plaintiffs, and, to show cause on their part why the said attachment should not be dissolved called one as a witness, who testified as follows: (State substance of testimony in narrative form, giving all questions objected to in full, objections and rulings, cross-examination and redirect, the same as in a bill of exceptions or a case made).

And thereupon the matters aforesaid with the said allegations and proofs aforesaid were then and their submitted to me for my decision.

I then and there, after consideration of the objections of said counsel of said plaintiffs to the application aforesaid which were reserved, as to the said objection thereto I decided and determined that I, as commissioner aforesaid, could not pass upon the alleged irregularities in said attachment suit.

And to the said objection (Proceed as before until all objections are disposed of).

As to the evidence received under objection as aforesaid the same was then and there received by me and the said objections aforesaid were overruled, and I determined and decided that the said questions proposed to the said witness as aforesaid and objected to as aforesaid were proper questions and not too general and that the same were relevant to the matters at issue aforesaid.

And thereupon, to wit, on the day of, 19.,

after hearing the said allegations and proofs of said parties and the arguments of counsel, I did then and there order the said attachment to be dissolved and the property attached to be restored to the said defendant, which order was in writing made and dated the day and year last aforesaid, and is in the words and figures following, that is to say: (Insert order).

And thereupon I taxed the costs of said proceeding at the sum of dollars and cents.

And I do hereby further certify and return that the foregoing are the complaints aforesaid and all things touching the same as in and by the said writ of *certiorari* they are mentioned and intended and the whole thereof. All of which with the writ aforesaid I respectfully certify and return to the said supreme court on this day of, 19..

.....,
Circuit court commissioner in and for
..... county, Michigan.

My fees \$.....

2883 Justice of the peace, writ

State of Michigan,)
County of) ss.

In the circuit court for the county of

In the name of the people of the state of Michigan, to
....., one of the justices of the peace within and for the
..... of, in the county of
....., greeting:

We, being willing, for certain reasons, that the circuit court for the county of, state of Michigan, should be certified what complaints are levied or affirmed before you, against, at the suit of, do therefore command you, that all and singular the said complaints together with all things touching the same, by whatsoever names the parties may be called, before you, you distinctly and openly send to the circuit court for the county of, state of Michigan, before the circuit judge of the said circuit court, at the court house in the, on the
....., and that you truly and fully answer to all the facts set forth in the annexed copy of the affidavit on which this writ is allowed, that the said court may cause to be done thereupon what of right and according to law should be done.

Hereof fail not, but make due return; and have you then and there this writ.

Witness, the honorable, circuit judge, at
....., this day of, 19..

....., Clerk.
....., Deputy clerk.

2884 Return; amendment, notice

The return of a writ of *certiorari* cannot be amended without an order of court for a further return and the giving of notice to the plaintiff in the proceeding.⁵⁵

MISSISSIPPI

2885 Writ

State of Mississippi, }
 county, } ss.

To, a justice of the peace in and for the
 supervisors' district of county,
 greeting:

Bond having been given and the proper petition and affidavit filed in this cause, you are hereby commanded, without delay, to send up to the circuit court for the district, of county, a full, true and complete transcript of your proceedings together with all original papers in the case of v., lately pending in your court.

Herein fail not under the penalty in such case made and provided.

Witness my hand and seal of said court this day of
, 19..

....., Clerk.

By, D. C.

To the sheriff of county to execute and return.

Return

Executed personally by delivering a true copy of this writ to, justice of the peace, this day of, 19..

....., Sheriff.

By, D. S.

2886 Writ of possession

State of Mississippi,

To the sheriff of county, greeting:

You are hereby commanded to take the following described property, to wit: (Describe property) taken from, under a certain deed of trust in favor of, and

⁵⁵ *Bernstein v. Thayer*, 157 Mich. 625, 626 (1909).

deliver said (Describe property) to, who having prayed for and obtained a writ of *certiorari* in a certain suit lately pending in the justice court of, wherein the said was plaintiff and defendant, the said having given bond for a *supersedeas*.

You are further commanded to summon the said to be and personally appear before the circuit court of district of said county, on the day of, 19.., to answer the said for the wrongful obtaining of said property.

And have then and there this writ with your return thereon. Given under my hand and seal of said court, this, etc.

Return

Executed personally by taking into my possession (Describe property) found in possession of one, and turned same over to, as directed in this writ.
(Signature)

WEST VIRGINIA

2887 Writ

The state of West Virginia, to the court of county, greeting:

Upon the petition of, and for certain causes shown before the judge of our circuit court of county, in vacation, we command you in the name of the state of West Virginia that you, under the seal of your court, certify and send a complete record, with certificates of evidence and bills of exceptions, with all things touching the proceedings in a certain matter of the appointment of road surveyor of precinct number in district, county, West Virginia, as fully as the same are now before you, to the judge of our circuit court on the first day of the term, 19.., of said court, at the court house thereof together with this writ. Bond in penalty of \$....., with condition prescribed, has been filed in the clerk's office of said court with approved security.

Witness, clerk of our said circuit court, at the court house aforesaid, this day of, and in the year of the state.

.....
Clerk.

Return

Executed the within writ on the within named county court of county, West Virginia, by delivering a cer-

tified copy thereof to, president of said county court, in person, in said county of, on this the day of, 19..

.....
Constable of county, and
designated to serve summons
where sheriff and others may
be interested.

NOTICE AND SCIRE FACIAS

2888 Notice (Mich.)

(Caption)

You will please take notice that a writ of *certiorari* was issued from this court in the above entitled cause at the clerk's office in the city of, bearing date, day of, 19.., and returnable on the day of, 19.., directed to, a circuit court commissioner of the county of, commanding him to certify the proceedings had before him in the dissolution of an attachment issued out of the circuit court for the county of, at the suit of against

Dated, etc.

.....
Attorney for plaintiff in error.

To, attorney for defendant.

(Attach affidavit of service)

2889 Scire facias to hear errors, practice

Respondents who fail to appear in opposition to a petition for a writ of *certiorari* may be brought in by *scire facias* to hear errors.⁵⁶

APPEARANCE AND MOTIONS

2890 Appearance, special (D. C.)

(Caption)

..... appearing specially herein for the sole purpose of this motion to object to the jurisdiction of the court over his person moves for an order striking out and setting aside the summons in this cause and the service and return thereof, and that the same may be declared null and void and of no effect, and that be thereby relieved from appearing to plead in answer to the declaration or otherwise.

⁵⁶ Rule 42, *supra*.

(Margin) Reasons for this pleading: The ground of this motion and the matter of fact and law intended to be argued is that said has never been summoned to answer, either any cause of action sought to be stated in the declaration filed herein, or any other, and that no summons or service has ever been made or pretended other than as stated in the petition of a writ of *certiorari* filed herein and that this whole so called suit is not only bad in law, but a nullity because no jurisdiction over the person of said has ever been obtained, or if ever obtained, jurisdiction has been lost by the lapse and abandonment of plaintiff's original pretended suit, and the absence of any summons or service as to any other, within the time prescribed by common law rule 15 of this court or otherwise.

.....

2891 Motion to dismiss (D. C.)

(Caption)

Comes the defendants by their attorney and move the court to dismiss the above entitled case and for cause say that no declaration upon her cause of action has been filed in this court by the plaintiff as is provided by rule 15 of the rules of court.

.....
Attorney for defendants.

(Attach notice to call up motion)

2892 Motion to quash, admission

A motion to quash a writ of *certiorari* to review a justice's judgment, admits the truth of all the facts alleged in the petition.⁵⁷

2893 Motion to quash (Ill.)

(Caption)

And now comes the defendants supervisors as aforesaid, by, their attorneys, and move the court to quash the said writ of *certiorari* issued in the above entitled cause. And for grounds of said motion show to the court here the following:

1. That the petition for said *certiorari* fails to show that there was any insufficiency or error in the said proceedings therein set forth, or any want of jurisdiction on the part of the said supervisors to make the order therein complained of.

2. That said petition for *certiorari* shows that at the time

⁵⁷ Gibson v. Ackermann, 70 Ill. App. 399, 405 (1897).

the said petition for a highway was considered by the highway commissioners of the two townships and that at the time of the appeal to these supervisors from the decision of the commissioners thereon, there was a petition for said highway with more than the required number of signatures thereon, and that none of the signers had then asked to withdraw therefrom; and that the said motion for leave to withdraw from said petition was made long after the loss of jurisdiction of the joint board of highway commissioners who had acted on said petition, and was properly refused.

3. That said petition for *certiorari* shows that the said expenses therein charged by these supervisors were necessarily incurred by them in performing their duties of condemning the right of way for said road, surveying and laying out the said highway and procuring releases of right of way therefor, and are properly taxed up against said townships in the matter of laying out the said highway; and that the charging of illegal fees, if they were illegal, would not in any way affect the jurisdiction of said supervisors, but would simply render them liable to account to said townships for such illegal fees.

4. That a legal construction of the descriptions of the lands set forth in the several deeds complained of, as shown by this record, will make them convey the lands described in township under the rule of law that when there is a repugnancy between two constructions in a deed, that is preferred which most favors the grantee, and these deeds show that they were intended to convey land in township for highway purposes.

.....
Attorneys for

DEMURRER

2894 Illinois

(Caption)

The demurrer of, respondent, to the petition of, petitioner.

This respondent, by protestation, not confessing or acknowledging all or any of the matters and things in said petition contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said petition, and for causes of demurrer shows that the same is not sufficient in law, that it does not show that any inferior court or tribunal has exceeded its jurisdiction or has proceeded illegally and that no appeal is allowed and no mode provided for reviewing the proceedings.

Wherefore, and for divers other good causes of demurrer appearing in said petition, this respondent demurs to the said petition, and to all matters and things therein contained, and

prays judgment of this honorable court whether he be compelled to make any or further answer to the said petition; and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

.....
Attorney for respondent.

I hereby certify that, in my opinion, the foregoing demurrer of, respondent, to the petition of, is well founded in law, and proper to be filed in the above cause.

.....
Attorney for respondent.

REPLY OR ANSWER

2895 Reply; requisites, filing

The reply to a petition for a writ of *certiorari* from the supreme court, under Illinois practice, stands as an appearance in the proceeding and must state briefly and concisely, without argument, the points and authorities relied upon to meet or obviate the alleged errors and to sustain the judgment.

Twelve copies of the reply must be filed on or before the first day of the term.⁵⁸

2896 Reply (Ill.)

(Caption)

The answer of, respondent, to the petition of, petitioner.

This respondent reserving to himself all right of exceptions to the said petition for answer thereto says that he admits that at the term of county court, a judgment and order was entered in favor of petitioner removing respondent as administrator of the estate of, deceased, and directing that the property be turned over to the petitioner; further he admits that he prayed for and perfected an appeal from said order and judgment of the court to the appellate court of the district, and that at the term, 19.., said appellate court filed an opinion on and rendered a judgment in said cause reversing the judgment and order of the court; and respondent avers that the appellate court in said judgment affirmed the judgment and order of the probate court of county in appointing this respondent as such administrator.

Respondent is informed and believes that court

⁵⁸ Rule 42, *supra*.

of county had jurisdiction of both the parties and the subject matter and proceeded regularly and legally in appointing respondent administrator of, deceased; he avers that a petition therefor was filed in time, mode, form and manner required by the rules of said court and the hearing and procedure thereon was in accordance with the long established and uniform practice of said court and in accordance with its rules.

And this respondent further answering denies that the petitioner is entitled to the relief or any part thereof in said petition demanded and asked, and prays the same advantage of this answer as if he had pleaded or demurred to the said petition; and prays to be dismissed with his reasonable costs and charges in this behalf most wrongly sustained.

.....
(Respondent)

.....
Attorney for respondent.

(Verification)

JUDGMENT

2897 Court's discretion, evidence

The granting or the refusing of a common law writ of *certiorari* is discretionary with the court. It is not a writ of right. The writ should not issue when a great public detriment or inconvenience is likely to result from an interference with the proceedings of an inferior tribunal; and if the writ has been issued improvidently, it should be quashed upon the presentation of the facts.⁵⁹ The court may receive extrinsic evidence before granting or refusing the writ of *certiorari*, or on motion quash the writ after it has been issued. It is proper practice for respondents to introduce evidence to show that justice does not require the issuance of the writ.⁶⁰

2898 Return, scope

The trial, in *certiorari*, is upon the record alone as disclosed by the return, and not upon the allegations of the petition, nor

⁵⁹ *Deslauries v. Soucie*, 222 Ill. 522, 524 (1906); *Mason & Tazewell Special Drainage District v. Griffin*, 134 Ill. 339; *Clark v. Chicago*, *supra*.

⁶⁰ *Deslauries v. Soucie*, *supra*; *Eourland v. Snyder*, 224 Ill. 478, 479 (1906).

upon any issue of fact.⁶¹ The return is taken as true notwithstanding findings of fact.⁶²

2899 Practice; supreme court, Illinois

If a writ of *certiorari* is not granted upon the petition for it, the original transcript of the record of the trial court is forthwith returned to the clerk of the appellate court; if the petition is granted, the cause proceeds as in case of a writ of error.⁶³

2900 Judgment requisites

The proper judgment upon a writ of *certiorari* for want of jurisdiction when the illegality appears upon the record, is that the record shall be quashed.⁶⁴ On *certiorari*, a justice judgment should be reversed and the garnishee should be discharged where the garnishee has answered before the justice denying liability and there was no contest of his answer.⁶⁵

2901 Judgment (Ill.)

(Caption)

Now come the parties hereto by their respective attorneys, and said defendants now enter a motion to quash the writ of *certiorari* herein, which said motion the court, upon due consideration doth allow; and it is thereupon ordered by the court that said writ of *certiorari* heretofore issued herein, be and the same is hereby quashed; it is further ordered that said petition be and it hereby is dismissed, at the costs of said petitioners. And it is adjudged that said defendants have and recover of and from said petitioners all costs by them expended,⁶⁶ and that execution issue therefor.

b

(Caption)

The people of the state of Illinois sent to as commissioners of highways of the town of in the county

⁶¹ Kammann v. Chicago, 222 Ill. 66; Powell v. Bullis, 221 Ill. 381; Joyce v. Chicago, 216 Ill. 469.

⁶² Gorham v. Johnson, 157 Mich. 433, 435 (1909).

⁶³ Rule 42, *supra*.

⁶⁴ Mason & Tazewell Special Drainage District v. Griffin, 134 Ill. 340; Smith v. Highways Commissioners, 150 Ill. 391.

⁶⁵ Hattiesburg Trust & Banking

Co. v. Hood, 52 So. 790 (Miss. 1910); Sees. 90, 2353, Code 1906 (Miss.).

⁶⁶ Omit the phrase "and that execution issue therefor," when the usual execution cannot issue against parties, as where they are commissioners of highways. Highways Commissioners v. Bear, 224 Ill. 259 (1906).

of, and state of Illinois, and to as town clerk of said township, and to, a justice of the peace of said county, their writ of *certiorari* done in these words. (For copy of writ see at the line on page and ending at the end of the line of page)

And on the day of, 19.., come the said, by, his attorneys, and the said defendants now here make return to said writ in words and figures following, viz.: (For copy of return see commencing at line of page and ending at the end of page).

And also, who are at this present time the commissioners of highways of said township, and also, who is now the town clerk of said township, and, the successor in office of the said as justice of the peace now here, and make an endorsement upon the return aforesaid, their return to said writ being in the words and figures as follows: (For copy of this return see commencing at line in page and ending at the end of the line same page) and the said return having been filed herein.

Whereupon, all and singular the premises being seen by, the judge of said court now here, being fully understood, and mature deliberation being thereon had, it appears to the said court now that the aforesaid order of the said commissioners of highways of said town of laying out the highway in said order and returns described is manifestly good and valid in law.

It is therefore considered and adjudged by the court, that the said order of said commissioners of highways laying out the highway aforesaid be and the same is hereby in all things affirmed (the said writ of *certiorari* to the contrary thereof in any wise notwithstanding).

And it is further considered and adjudged by the court that the said defendants have and recover of the said their costs herein to be taxed by the clerk of this court, and that they have execution therefor.

(West Virginia)

(Caption)

This day came the plaintiff by his attorney and the defendant by its attorney, and by consent of counsel, this matter was submitted to the court for decision, upon the petition of the plaintiff, exhibits filed therewith, and upon the demurrer of the defendant to the petition and in which demurrer the plaintiff joined, upon the return to the petition of the plaintiff by the defendant, and upon the motion of the defendant to quash the writ, and was argued by counsel.

On consideration whereof the court being of the opinion that the petition of the plaintiff is sufficient doth overrule the

demurrer thereto, and also being of opinion that the return to the writ does not constitute a sufficient return or answer as to why the relief sought for in the petition be granted, it is ordered that the order of the defendant the county court of county, entered on the day of, 19.., removing the plaintiff,, as surveyor of roads for precinct number in district, in said county, and appointing in his place and stead, be reversed, set aside and annulled; and to this action of the court the defendant by its attorney excepted.

It is further ordered that the plaintiff recover from the defendant its costs in about this proceeding expended. And as to this provision the county court by its attorney excepted.

And upon motion of the defendant a stay of this order is granted for the period of days to enable the defendant to apply to the supreme court of appeals for a writ of error.

2902 Bill of exceptions, necessity

The sufficiency of the return of a writ of *certiorari* to justify the quashal of the writ and the dismissal of the petition for it is reviewable by the supreme court without a bill of exceptions.⁶⁷

⁶⁷ Logue v. Batterton, 247 Ill. 605, 607 (1910).

CHAPTER XLVI

CITY'S INCORPORATION, ANNEXATION AND DISCONNECTION OF TERRITORY

INCORPORATION

PETITION

§§

2903 Requisites

ELECTIONS

2904 Law governing

2905 Ordinance

2906 Result of election

TERRITORIAL DIVISION

2907 Ordinance

BOND

2908 Mayor

OATH

§§

2909 Mayor

ANNEXATION AND DIS- CONNECTION

2910 Territory, nature of

2911 Proceeding, nature of

ORDINANCE

2912 Filing, notice

2913 Effect

2914 Repeal, power

INCORPORATION

PETITION

2903 Requisites

Under Illinois statute, a town or village of not exceeding four square miles of contiguous territory and having a population of not less than one thousand inhabitants may become incorporated as a city by filing a petition in the office of the county clerk of the county court addressed to the county judge, or where the territory is in more than one county, then the petition is to be addressed to the county judge of the county where a greater portion of the territory is situated; which petition should describe the boundaries of the proposed city, should state its name, should pray that the question whether the legal voters of the described territory will organize as a city under the statute be submitted to them, and should be signed by fifty legal voters.¹

In Michigan a petition for the incorporation of a city of the fourth class must be addressed to the village council and it must be signed by one hundred or more resident freeholders of an incorporated village containing a population of not less

¹ Sec. 5, c. 24, Hurd's Stat. 1911,
p. 252.

than three thousand nor more than ten thousand, according to the preceding Federal or state census.²

ELECTIONS

2904 Law governing

An election for a city organization in Illinois may be held under the general City and Village act, and not under the Ballot law of 1891.³

2905 Ordinance (Ill.)

An ordinance providing for the election of certain officers therein mentioned.

Whereas, the city of is duly organized under "An Act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872;

Whereas, it is necessary for the purpose of said Act that an election be called and held in said city of for the election of a mayor, a city clerk, a city attorney, a city treasurer and two aldermen from each ward of said city; therefore:

Be it ordained by the city council of the city of

Section 1. That an election be and is hereby called to be held in said city in the several wards thereof, and at the voting places therein designated by the city council on the day of, 19..

Section 2. At said election there shall be elected a mayor, a city clerk, a city attorney, a city treasurer and two aldermen from each of the wards of said city, to represent such ward in the city council.

Section 3. Such election shall be conducted, the poll list kept, and the votes canvassed in the same manner, as nearly as may be in the case of election of county officers under the general laws of this state. The judges of election shall appoint clerks when necessary to fill vacancies, and the judges and clerks shall take the same oath and have the same powers and authority as the judges and clerks of general state elections. After closing the polls the ballots shall be counted and the returns made out and returned under seal to the city clerk within two days after the election; and thereupon the city council shall examine and canvass the same and declare the result of the election, and cause a statement thereof to be entered upon its journal. The officers elected at said election,

² (2957), (2958), C. L. 1897, Mich.

³ *People v. Weber*, 222 Ill. 180, 189 (1906).

one-half the aldermen excepted, shall hold their respective offices until the next succeeding regular election for such officers respectively, and until their successors are elected and qualified as provided by law.

Section 4. It shall be the duty of the city clerk within five days after the result of the said special election is declared to notify all persons elected of their election.

Section 5. It shall be the duty of the city clerk to give at least twenty days' notice of said election and he shall cause said notice to be published for the same length of time and in the same manner as is required in the case of regular annual elections in said city of

Section 6. This ordinance shall take effect and be in force from and after its passage.

Passed, 19..

Approved, 19..

.....Mayor.

2906 Result of election

A proposition for city organization under the General law, when submitted to a general or a special election must receive a majority of all the votes cast at such an election, and not merely a majority of the votes cast on the proposition.⁴

The incorporation of a city is effected at the time that the vote is canvassed and determined to be for the incorporation or organization under the General law.⁵ A plat is no part of the organization of a city.⁶

TERRITORIAL DIVISION

2907 Ordinance (Ill.)

An ordinance dividing the city of into wards and describing the boundaries thereof.

Be it ordained by the city council of the city of.....:

Section 1. That the city of shall be and is hereby divided into wards.

Section 2. The boundary of the first ward shall be as follows: (Set forth boundaries) and the territory included within said boundaries shall constitute and be known as the first ward. (Proceed in same manner with all wards)

⁴ People v. Weber, 222 Ill. 187.

⁵ Dowie v. Chicago, Waukegan & North Shore Ry. Co., 214 Ill. 49, 55 (1905).

⁶ Dowie v. Chicago, Waukegan & North Shore Ry. Co., *supra*.

Section 6. This ordinance shall take effect and be in force from and after its passage.

Passed, 19..

.....City Clerk,

Approved, 19..

.....Mayor.

BOND

2908 Mayor

⁷ The condition of the above obligation is such that whereas was elected mayor of the city of for the ⁸ (charter year of 19..).

Now, therefore, if the said shall faithfully execute the duties of his office and account for and pay over and deliver all moneys and other property received by him on account of the city, then this obligation shall be void; otherwise it shall remain in full force and effect.

(Signatures and seals)

OATH

2909 Mayor

(Venue)

I,, having been duly elected to the office of mayor of the city of, county and state aforesaid, do hereby solemnly swear that I will support the constitution of the United States of America and the constitution of the state of Illinois, and observe and maintain the organic law of the city of, and that I will devote as much of my time to the duties of my office as an efficient and faithful discharge thereof may require. So help me God.

Subscribed, etc., (before circuit court clerk).

ANNEXATION AND DISCONNECTION

2910 Territory, nature of

Territory which is sought to be annexed to a city must be contiguous: territory is not contiguous where the only connection is at the corners of the tracts.⁹

7 Precede by usual obligation to city.

⁸If a city is not under special charter organization, insert instead

“term of years from,
19..”

⁹ *Morgan Park v. Chicago*, 255 Ill. 190, 192 (1912).

2911 Proceeding, nature of

The annexation to, or the disconnection of territory is *pro tanto* a new organization of a municipality.¹⁰

ORDINANCE

2912 Filing, notice

The filing of certified copies of the disconnecting ordinance is directory, not mandatory, and they may be filed at any time. One certified copy of the ordinance should be filed by the city for record in the recorder's office, and another certified copy should be filed with the county court clerk. The county clerk is required to have the notice for the extension of taxes. Notice to the public is afforded by the records of the recorder's office.¹¹

2913 Effect

Territory becomes disconnected from a city upon the passage of an ordinance therefor.¹²

2914 Repeal, power

A municipality has no power to re-annex territory by repealing the ordinance which disconnected the territory.¹³

¹⁰ People v. Ellis, 253 Ill. 369, 375, 376 (1912).

¹¹ People v. Ellis, 253 Ill. 376, 377; Sec. 2, c. 24, Hurd's Stat. 1911, p. 316, par. 207.

¹² People v. Ellis, 253 Ill. 377.

¹³ People v. Ellis, *supra*.

CHAPTER XLVII

CIVIL SERVICE

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IN GENERAL

2915 Legislative power, scope

The creation of officers, the prescribing of the manner of their appointment or election, the conferring of powers and the imposition of duties upon them, the regulation of their relations with one another and the manner and the means by which they shall enforce the laws, are all within the control of the legislature, except where the constitution, expressly or by implication, has imposed certain duties, or it has conferred certain powers, or where the name of the office itself implies the possession of certain exclusive powers. The constitutional provision that the officers of the state executive department shall perform such duties as may be required of them by law is not a restriction but a grant of legislative power.¹

2916 Statute, nature and object

The Illinois State Civil Service law is substantially the same

¹ *People v. McCullough*, 254 Ill. 9, 16, 23 (1912); Art. 3; Cl. 1, sec. 1, art. 5, Const. 1870 (Ill.).

as the City Civil Service act of 1895.² The object of the Civil Service law is to secure merit, fitness and competency in public service by free, public, competitive and practical examinations for all appointments and promotions, having reference only to the relative capacity of the persons examined to discharge the duties of the positions they seek.³

2917 Employees, nature

Persons who are employed in the different departments of the public service are state employees, receiving state pay, and are not in the private service of officers of the respective departments.⁴

2918 Employees, probation officers

The power of appointment and removal of probation officers is in the courts; and under the present constitution, this power cannot be transferred to another department of the government, such as the executive department of which the county or civil service commissioners are a part. Therefore, the first proviso to section 6 of the Juvenile Court act, which is severable from the valid portion of the act, is unconstitutional and void.⁵

2919 Employees, secretary of state's assistants

The bookkeeper, the assistant chief clerk, and the chief corporation clerk in the office of the secretary of state, are under civil service, as their respective offices and duties are statutory and not constitutional or personal to the secretary of state.⁶

EXAMINATION

2920 Physical, police patrolmen

It is lawful to subject police patrolmen to physical and medical examinations to determine their ability to continue in the service.⁷

² People v. McCullough, 254 Ill. 14.

³ People v. McCullough, 254 Ill. 25.

⁴ People v. McCullough, 254 Ill. 24.

⁵ Witter v. Cook County, 256 Ill. 616, 624 (1912); Art. 3, Const. 1870 (Ill.).

⁶ People v. McCullough, 254 Ill. 21, 28; Sec. 31, State Civil Service law (1911 L., p. 222).

⁷ People v. Steward, 249 Ill. 311 (1911); Sec. 12, Civil Service law; Sec. 6, art. 2, Const. 1870.

APPOINTMENT

2921 Revocation

The power to appoint to a classified position under the civil service law is in the head of the department or office in which the position is to be filled: this power is not in the civil service commissioners. An appointment is complete and the appointive power is exhausted, when the last act required of the appointing power has been performed. The appointing power cannot thereafter revoke the appointment; and the appointee can only be removed by lawful authority.⁸

CERTIFICATE

2922 Withdrawal

Civil service commissioners have power to withdraw a certificate which has been improvidently issued.⁹

REMOVAL AND DISCHARGE

COMMISSION

2923 Power, scope

Under Illinois statute a civil service commission alone has power to determine what shall constitute a cause for discharge of a civil service employee, without specifying in written rules every ground which shall be deemed cause for removal.¹⁰ A civil service commission may approve or disapprove the finding of the trial board, without reviewing its findings, calling witnesses or reviewing evidence or notifying the accused.¹¹

CHARGES

2924 Necessity

In order to obtain the dismissal of a civil service employee, it is not necessary to prefer written charges against him when his office is dependent for its existence upon appropriations of

⁸ People v. Lower, 251 Ill. 527, 63, 65 (1906); Par. 457, c. 24, 529 (1911). Hurd's Stat. 1905, p. 395.

⁹ People v. Lower, *supra*.

¹⁰ Kammann v. Chicago, 222 Ill.

¹¹ People v. Chicago, 234 Ill. 416, 420 (1908).

which fact he has notice and he is dismissed, in good faith, for want of funds, or to reduce expenses.¹²

2925 Requisites

It is not necessary that a charge preferred before a civil service commission against a civil service employee should be formulated in technical language similar to that of a declaration or an indictment, but it is sufficient if the charge is reduced to writing and it is in such a form that the employee can clearly understand the ground assigned for his removal.¹³

2926 Notice

The giving to or waiving of written notice by a civil service employee of charges filed against him and of the time and place of hearing the charges, is jurisdictional.¹⁴

2927 Objections, practice

The sufficiency of charges and specifications made against a civil service employee must be questioned by him before the civil service commission, and an objection comes too late when first made on appeal.¹⁵

¹² *Fitzsimmons v. O'Neill*, 214 Ill. 494 (1905).

¹³ *Joyce v. Chicago*, 216 Ill. 466, 471 (1905).

¹⁴ *Powell v. Bullis*, 221 Ill. 379, 381 (1906).

¹⁵ *Sullivan v. Lower*, 234 Ill. 21, 23 (1908).

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IN GENERAL

2928 Proceeding, nature

The condemnation of private property for public use under the Illinois Eminent Domain act is a special, statutory and summary proceeding. It is in no essential particular equitable in its character.¹ A proceeding to condemn extends to the entire piece or parcel of real estate which is sought to be taken, and not merely to the interest of a particular defendant in that real estate.²

2929 Law governing

The Illinois Eminent Domain act of 1845, in so far as it is applicable to matters falling within it, was modified by the Act of 1852. The latter Act was amended by the Act of 1869. All these Acts are remedial and are applicable to proceedings for condemnation of lands by railroads heretofore, or hereafter organized.³

¹ Sweeney v. Chicago Telephone Co., 212 Ill. 475, 476 (1904); Ligare v. Chicago, Madison & Northern Ry. Co., 160 Ill. 530, 532, 535 (1896).

² Chicago & Northwestern Ry. Co. v. Miller, 251 Ill. 58, 62 (1911).

³ Chicago, Burlington & Quincy Ry. Co. v. Abbott, 215 Ill. 416, 423 (1905).

POWER OF EMINENT DOMAIN

2930 Exercise of right, conditions

The filing of a copy of the by-laws and a plat of the railroad are not conditions precedent to the exercise of the right of eminent domain.⁴

2931 Exercise of right, limitation

The power of eminent domain must be exercised lawfully, for public uses, and not in disregard of the well recognized private rights.⁵ The power of condemnation may be exercised successively until the statutory limit is reached. A partial exercise of this power does not exhaust it.⁶

2932 Consolidated railroads

The constitutional provision which forbids consolidation with parallel or competing lines is not violated by the taking of land and the laying of tracks thereon which would be parallel to the tracks and approaches of another railroad, both tracks being on the same right of way.⁷ The prohibition of the consolidation of more than two corporations refers to corporations which were in existence in 1872.⁸

2933 Drainage district

Properly organized drainage districts may avail themselves of the Eminent Domain act to obtain for their ditches a legal right of way through and over the lands of others.⁹

The sanitary district of Chicago has implied power under the statute creating it to condemn land in use for public purposes.¹⁰

⁴ East St. Louis, Columbia & Waterloo Ry. v. Illinois State Trust Co., 248 Ill. 559, 562 (1911); Sec. 6, c. 114, and Sec. 9, c. 109, Rev. Stat. Ill.

⁵ South Park Commissioners v. Montgomery Ward & Co., 248 Ill. 299, 305 (1911).

⁶ Chicago & Milwaukee Electric R. Co. v. Chicago & Northwestern Ry. Co., 211 Ill. 352, 360 (1904).

⁷ Chicago & Milwaukee Electric R. Co. v. Chicago & Northwestern Ry. Co., 211 Ill. 359; Sec. 11, art. 11, Const. 1870 (Ill.).

⁸ Chicago & Western Indiana R. Co. v. Heidenreich, 254 Ill. 231, 235 (1912); Par. 50, Hurd's Stat. 1911, p. 570.

⁹ Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Polecat Drainage District, 213 Ill. 83, 86 (1904); Smith v. Claussen Park Drainage District, 229 Ill. 155, 160 (1907).

¹⁰ Pittsburgh, Ft. W. & C. Ry. Co. v. Sanitary District, 218 Ill. 286, 293 (1905).

SPECIFIC USES AND PURPOSES

2934 Car barns and power houses

A street railway company may condemn private property for the construction of car barns and power houses to be used in connection with its railroad.¹¹

2935 Changing course of stream

The authorities of a village have the statutory power to condemn land for the purpose of changing the course of a stream by making an entirely new bed or course for the stream and diverting the water thereto from the old bed.¹²

2936 County jail

A county may acquire land by condemnation for the building of a jail.¹³

2937 Depot

A railroad company has the right to condemn land for a depot, although it leases and uses the right of way of another railroad company to reach the grounds upon which the depot is to be erected.¹⁴

2938 Ferries

A city or village may acquire, under the statute, land by condemnation for the purpose of establishing a ferry.¹⁵

2939 Location of railroad

The legal location of a line of railroad can be made only by the railroad company, or by the engineer's survey and its adoption by the company.¹⁶

¹¹ Eddleman v. Union County Traction & Power Co., 217 Ill. 409, 416, 417 (1905).

¹² Prairie du Rocher v. Schoening-Koeningsmark Milling Co., 248 Ill. 57, 59 (1910); Cl. 30, sec. 1, art. 5, Cities and Villages act (Ill.).

¹³ Mercer County v. Wolff, 237 Ill. 74, 77 (1908).

¹⁴ Terre Haute & P. R. Co. v. Robins, 247 Ill. 376, 380 (1910).

¹⁵ Helm v. Grayville, 224 Ill. 274, 278 (1906); Par. 194, Hurd's Stat. 1905, c. 24.

¹⁶ East St. Louis, Columbia & Waterloo Ry. v. Illinois State Trust Co., *supra*.

2940 Re-location of railroad

The re-location of a railroad consists in projecting a new line, in whole or in part, upon ground which is not included within the original right of way or its additions, requiring the use of an entirely different and distinct right of way. No re-location takes place where tracks are merely changed from one side to another of a right of way of a full or less statutory width.¹⁷

A railroad company is without power to re-locate its road; and therefore has no power to condemn for re-location purposes after it has fixed the location of the road under a charter prescribing the termini and general route of the railroad, leaving the determination of the details to the discretion of the corporation.¹⁸

2941 School sites

Lands selected for school sites may be purchased or condemned.¹⁹

2942 Side-tracks, etc.

A street railway company may condemn such private property as is necessary for side-tracks, station grounds, power-houses, switches, or turn-outs to render the use of the highway or street practicable and efficient.²⁰

PUBLIC PROPERTY

2943 Generally

Land which is devoted to a public use cannot be taken by condemnation for another public use unless the legislature has authorized such taking expressly, or by necessary implication.²¹

Public property cannot be condemned for a use which is inconsistent with the one to which the property has been devoted; as where private property has been dedicated for a specific

¹⁷ Chicago, Milwaukee & Electric R. Co. v. Chicago & Northwestern Ry. Co., 211 Ill. 361.

¹⁸ Cairo, V. & C. Ry. Co. v. Wood-yard, 226 Ill. 331, 335 (1907); Lusby v. Kansas City, M. & B. R. Co., 73 Miss. 360 (1895).

¹⁹ Thompson v. School Trustees, 218 Ill. 540, 543 (1905).

²⁰ Eddleman v. Union County Traction & Power Co., 217 Ill. 417.

²¹ Pittsburgh, Ft. W. & C. Ry. Co. v. Sanitary District, 218 Ill. 292.

public use, the state has no power to change the use and apply the property to another use which is inconsistent with the dedication.²²

2944 County property

The power of eminent domain does not extend to the taking of public property. The property of a county is public property.²³

2945 Right of way

One railway company has no power to condemn, longitudinally, the right of way, or any portion thereof, of another railroad company, to the extent of the statutory width limit. But land of one railroad company which is in excess of the statutory limit of which the company has only a remote and uncertain need, may be condemned by another railroad company having a present and certain right.²⁴

JURISDICTION

2946 Scope

Courts have legal as well as equitable jurisdiction in condemnation proceedings.²⁵

2947 County and circuit courts

The county courts are in Illinois given jurisdiction in condemnation matters regardless of the amount involved. Their jurisdiction is equal to and concurrent with that of the circuit courts.²⁶

PARTIES

2948 Petitioner, *de facto* corporation

A condemnation proceeding is maintainable by a *de facto* corporation.²⁷ The question whether or not a corporation is

²² South Park Commissioners v. Montgomery Ward & Co., 248 Ill. 306.

²³ Edwardsville v. Madison, 251 Ill. 265, 266 (1911).

²⁴ Chicago & Milwaukee Electric R. Co. v. Chicago & Northwestern Ry. Co., 211 Ill. 362, 366.

²⁵ Chicago & Northwestern Ry. Co. v. Garrett, 239 Ill. 297, 301, 302 (1909).

²⁶ McCormick v. West Chicago Park Commissioners, 118 Ill. 655, 662 (1886); Sec. 2, c. 47 Rev. Stat.; Bell v. Mattoon Water-Works & Reservoir Co., 235 Ill. 218, 219, (1908).

²⁷ McAuley v. Columbus, Chicago & Indiana Central Ry. Co., 83 Ill. 348, 352 (1876).

improperly exercising its franchise is one between it and the state.²⁸

2949 Respondents, generally

All persons who have any right, title or interest in the property sought to be condemned should be made parties defendant; and if one who has an interest in the property is not made defendant, the petitioner will not acquire that interest. One defendant cannot eliminate another from the proceedings by disputing his title or by raising a controversy as to his interest.²⁹

It is not essential to the jurisdiction of the court, that all owners or persons who are interested in the land should be brought into court, even as to land taken, for the reason that compensation may be ascertained separately, and that the persons who are not made parties are not affected by the proceeding.³⁰

Every person who is interested in the property sought to be condemned may become a party and have his right, of whatever character, considered and determined.³¹

2950 Respondents, *pendente lite*

It is proper to make the purchaser *pendente lite* a party defendant to a condemnation proceeding.³²

2951 Respondents, changing grade at railroad crossing

In Michigan the only persons who are necessary parties to a petition and who are entitled to damages under the Railroad Crossing Grade Changing act are those who are owners of or have an interest in the land abutting upon the portion of the street or highway of which the grade is to be changed; and the extent of their recovery is indemnity for the damages to the property abutting only and to their respective interest therein as result from the change of the grade excluding damages to business, if any, is transacted upon the land, whether by the

²⁸ Thomas v. St. Louis, Belleville & Southern Ry. Co., 164 Ill. 634, 639 (1897).

²⁹ Chicago & Northwestern Ry. Co. v. Miller, 251 Ill. 62.

³⁰ Dowie v. Chicago, Waukegan &

North Shore Ry. Co., 214 Ill. 49, 52 (1905).

³¹ Chicago & Northwestern Ry. Co. v. Garrett, 239 Ill. 301.

³² Eddleman v. Union County Traction & Power Co., 217 Ill. 417, 420.

land owner or by a tenant, and for damages sustained on account of the temporary or permanent inconvenience.³³

2952 Petition to become party (D. C.)

In the supreme court of the District of Columbia,
Holding a District Court.
In the matter of the condemnation }
of squares and, } No.
Washington, D. C. }

Comes now, and asking to be made a party defendant in the above entitled cause, respectfully represents:

1. That by a deed of trust bearing date on the day of, and recorded, in liber....., folio of the land records of the District of Columbia, conveyed to him all that part of squares, and, which were not embraced or in any way affected by the suit then pending in the supreme court of the District of Columbia, known as United States v., equity No.,, commonly known as ".....," to have and to hold the said premises and to sell and convey the same and distribute the proceeds of said sale to them in proportion to their interests, as heirs at law and next of kin of the said

2. That since the execution of the said deed, the petitioner has for the said grantors parted with all the interest he acquired by said deed in square And your petitioner is also informed and believes that said..... one of the said grantors and the widow of the said..... has departed this life.

3. That by reason of the said deed of conveyance, your petitioner holds title to the said parts of the said square, in trust for the said grantors and subject to the terms thereof.

Your petitioner therefore prays that inasmuch as the said square is to be condemned for the use of the United States, that the full, just and proper price may be paid therefor and that he be permitted to receive the same and hold and distribute it in obedience to the terms of the said deed of trust.

.....

(Verification)

³³ Detroit v. Detroit United Ry., 156 Mich. 106, 116 (1909); Detroit v. Michigan Central R. Co., 156

Mich. 121, 123 (1909); (4229-4261), C. L. 1897 (Mich.).

2953 Suggestion of death

(Caption)

Now comes the attorney for the United States and suggests to the court that, named as an owner, is dead, and that his widow, and children, and, and, minor, survive him; and that said proceeding in this cause be amended by making the said widow and the said children parties; and that proper citation be issued to them and that the order of publication be amended from this date so as to include the said names.

Wherefore, petitioner prays that an order may be made making said amendment to said petition, and for such other relief as may be required.

.....,
Attorney for the United States
in and for the District of Columbia.

Order

Upon consideration of the suggestion of the United States attorney, it is, this day of, 19.., ordered that said original petition be amended by adding thereto as parties the following persons: and, minor, and that citation issue to them, and that the order of publication which has been heretofore published be continued but that the names of said parties be added thereto.

By the court,
.....,
Justice.

PETITION

2954 Authority and purpose

A petition for condemnation should show authority of the company to take the specific land sought to be taken and the object or purpose for which it is required: from which it should appear that the land is to be used for the benefit of the public.³⁴ But it is not necessary that the petition should state the particular manner in which the land sought to be condemned is to be used, and such use may be shown by the petitioner's plans

³⁴Smith v. Chicago & Western
Indiana R. Co., 105 Ill. 511, 518
(1883).

and specifications.³⁵ Unless a petitioner limits its power of eminent domain by an appropriate averment in the petition, or by stipulation, such power is taken to be co-extensive with its charter powers.³⁶ The averment that the land or a portion of it described in the petition by a railroad company is necessary to petitioner's right of way, side-tracks, depot and depot grounds, freight yards, shops and appurtenances for the construction and operation of its line of railroad, is a sufficient statement, under the statute, of the purposes for which the property is sought to be taken, without stating the particular manner in which the land is to be used.³⁷

2955 Description of property

The property sought to be condemned must be described with reasonable certainty in the petition.³⁸ A petition sufficiently describes land to be taken if a surveyor would be able to definitely locate the land from the description in the petition and the exhibits.³⁹

Any formal defect as to description or lack of certainty in a petition or a cross-petition for condemnation, is cured after verdict.⁴⁰

2956 Ownership and interest

The petitioner is required, at its peril, to ascertain and name in the petition the true owner of the land sought to be condemned and taken.⁴¹ It is not necessary, however, that the petition should set out who is the true owner of the property, but it is sufficient to merely state that certain persons claim some interest in the premises.⁴² If the estate sought to be condemned is a limited one, or it is subject to conditions or restric-

³⁵ Pittsburgh, Ft. W. & C. Ry. Co. v. Sanitary District, 218 Ill. 289.

³⁶ St. Louis & Springfield Ry. Co. v. Smith, 216 Ill. 339 (1905).

³⁷ Suver v. Chicago, Santa Fe & California Ry. Co., 123 Ill. 293 (1887).

³⁸ Chicago, Ottawa & Peoria Ry. Co. v. Rausch, 245 Ill. 477, 482 (1910); Helm v. Grayville, 224 Ill. 274, 283 (1906).

³⁹ Smith v. Claussen Park Drainage District, 229 Ill. 155, 165 (1907); Sanitary District v. Pitts-

burgh, Ft. W. & C. Ry. Co., 216 Ill. 575, 578, 579 (1905).

⁴⁰ Drainage Commissioners v. Knox, 237 Ill. 148, 154 (1908).

⁴¹ Chicago, Milwaukee Electric R. Co. v. Diver, 213 Ill. 26, 31 (1904); Chicago & Northwestern Ry. Co. v. Chicago Mechanics' Institute, 239 Ill. 197, 217 (1909); Thomas v. St. Louis, Belleville & Southern Ry. Co., 164 Ill. 637.

⁴² Thomas v. St. Louis, Belleville & Southern Ry. Co., *supra*.

tions either in title or mode of use, or if it is encumbered by some public easement or right, it should be set out in the petition.⁴³ Under an allegation that a tract of land is owned by several persons, it will be presumed that the owners are tenants in common in the absence of evidence to the contrary; and where there is no averment of a less title or of any incumbrance, the defendants will be regarded as owners of an unincumbered title in fee simple.⁴⁴ The averments of the petition as to the nature or extent of the estate or title of the defendants are binding on the petitioner, but not on the defendants.⁴⁵

2957 Agreement, failure of

The petition should also show an inability to agree with the land owner as to the compensation to be paid.⁴⁶ It is sufficient if a petition alleges the failure to agree with certain named parties who are the only persons from whom the petitioner could have obtained title to the property.⁴⁷ The non-acceptance of an offer constitutes a failure to agree and authorizes the filing of a petition for condemnation, without waiting a specified time for an acceptance.⁴⁸

FORMS

2958 Alley, opening (D. C.)

(Caption)

The petition of and respectfully represents:

1, That they are the commissioners of the District of Columbia, and file this petition for the purpose of acquiring by condemnation the land necessary for the opening of an alley through part of block number and part of block number in the District of Columbia pursuant to the provisions of an act of Congress, approved February 23, 1905, entitled "An act to amend chapter 55 of an act entitled 'an act to establish a code of law for the District of Columbia.' "

2, That by section 1608 of said act of Congress, the commis-

⁴³ Sanitary District v. Pittsburgh, Ft. W. & C. Ry. Co., *supra*.

⁴⁴ Metropolitan West Side Elevated Ry. Co. v. Eschner, 232 Ill. 210, 213 (1908).

⁴⁵ Sanitary District v. Pittsburgh, Ft. W. & C. Ry. Co., *supra*; Metropolitan West Side Elevated Ry. Co. v. Eschner, *supra*.

⁴⁶ Eddleman v. Union County Traction & Power Co., 217 Ill. 416.

⁴⁷ Thomas v. St. Louis, Belleville & Southern Ry. Co., 164 Ill. 636.

⁴⁸ Mercer County v. Wolff, 237 Ill. 80.

sioners of said district are authorized to open, extend, widen or straighten alleys and minor streets in the District of Columbia, under the following conditions, namely:

"First, Upon the petition of the owners of more than one-half of the real estate in the square or block in which said alley or minor street is sought to be opened, extended, widened or straightened, accompanied by a plat showing the opening, extension, widening or straightening proposed;

Second, When the commissioners deem the public interests require such opening, extension, widening or straightening;

Third, When the health officer of said District certifies to the necessity for the same on the grounds of public health."

3, That section 1608e of said Act provides; "That whenever it becomes necessary to open, widen, extend or straighten alleys or minor streets by condemnation the said commissioners shall institute condemnation proceedings in the supreme court of the District of Columbia, sitting as a district court, by a petition *in rem* particularly describing the land to be taken, which petition shall be accompanied by duplicate plats to be prepared by the surveyor of said District, showing the courses and boundaries of the alley or minor street proposed to be opened, widened, extended or straightened, the number of square feet to be taken from each lot or part of lot in the square or block, showing existing alleys or minor streets in said square or block, and such other information as may be necessary for the purposes of such condemnation. Upon the filing of said petition, one copy of the plat, endorsed with the docket number of the case shall be returned by the clerk of the said court to the said surveyor for record in his office."

4, That your petitioners deem that the public interests require the opening of an alley through part of said block and part of said block in the District of Columbia, and that it is necessary to acquire the herein-after described land, by condemnation, for the opening of said alley.

5, That the land necessary for the opening of said alley, and the names of the owners of the fee of said land, are particularly described as follows:

| Description of parts of lots taken for opening alley through block | | |
|---|------------------|-------|
| Lots | Part to be taken | Owner |
| | | |

6, That the duplicate plats prepared by the surveyor of the District of Columbia showing the courses and boundaries of said alley proposed to be opened, the number of square feet to be taken from each lot or part of lot in said blocks, and such other information as will be necessary, in the

judgment of your petitioners, for the purpose aforesaid are filed herewith as part hereof and marked exhibit "D. C. No. 1."

The premises considered, your petitioners pray that a public notice of not less than day.. be given of the filing of this petition by advertisement in such a manner as this honorable court shall prescribe, warning all persons having interest in these proceedings to attend court at a day to be named in said notice, and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and the assessments of benefits of the jury, and that a copy of said notice be served by the United States marshal of the District of Columbia, or his deputies upon such owners of the fee of the land to be condemned as may be found by said marshal or his deputies within the District of Columbia; that after the return of the marshal of the District and the filing of proof of publication of said notice, the said marshal be directed to summon a jury of five judicious disinterested men, not related to any person interested in these proceedings and not in the service or employment of the District of Columbia, or of the United States of America to assess the damages each owner of land to be taken may sustain by reason of the opening of the aforesaid alley and the condemnation of the land for the purposes thereof, and to assess the benefits resulting therefrom including the expenses of these proceedings, as provided in the aforesaid act of Congress; that such other and further orders may be passed and proceedings had herein as were contemplated by the aforesaid act of Congress, to the end that the hereinbefore described land in fee simple may be condemned and secured for the opening of an alley through part of said block and part of block as aforesaid. And they will ever pray, etc.

.....
Commissioners of the District of Columbia.

.....
Attorney for petitioners.

(Verification)

2959 Changing grades at railroad crossings (Mich.)

(Caption)

To the recorder's court for the city of

The city of, a municipal corporation, existing under and by virtue of the laws of the state of Michigan by, corporation counsel of the city of, respectfully represents:

1, That this petition is made and filed by the city of as commencement of judicial proceedings in pursuance of an act of the legislature of the state of Michigan, entitled "An act to provide for separate grades for railroads, public high-

ways and streets where railroads intersect such public highways and streets," approved May 20, 1893, and amendments thereto for the purpose of separating the grades on railroad company, the railway company and the railway company of Canada and avenue between the following points: on avenue, from a point feet of line of the railroad right of way to a point feet of the line of the line of the railroad right of way; and changing a grade of the intersecting street known as avenue from the line of avenue to the line of avenue, in accordance with the terms hereto attached and set forth in the resolution by the common council of the city of, a certified copy of which is hereto attached, and to make just compensation to all persons sustaining damages thereby.

2, That the property abutting on that part of avenue and intersecting street, viz.: avenue on which the grade is to be changed, together with the owners, mortgagees, lessees and others having an interest therein is as follows:

| Description of each of the several parcels of private property proposed to be taken | Names of persons interested | Interest of each |
|---|-----------------------------|------------------|
| | | |
| | | |
| | | |

3, That the manner in which said property will be affected by said changing of grades and the extent to which said property will be affected, is set forth in the plan heretofore referred to and hereto attached.

4, That on the day of, 19.., the common council of the city of, by resolution, a certified copy of which is hereto attached, declared it necessary for the public benefit to make such separation of grades in accordance with the plan referred to in said resolution.

5, That the names of the railroad companies and the street railway companies to be affected by the proposed changes are as follows: (Insert name) a corporation existing under and by virtue of the laws of the state of Michigan, etc.

6, Your petitioner further represents that an agreement respecting such separation of grades has been entered into between your petitioner, the city of, and the

(Name the contracting parties), a copy of which agreement is hereto attached; and that the provisions contained in said agreement expressly waive any and all claims for damages by reason of any change of grades in said streets, releasing all damages arising from loss of traffic occasioned by said change of grades, said releases were intended to apply and did apply to each of said parties.

Your petitioner prays that a summons may issue out of and under the seal of this court directed to (Insert names of respondents) commanding each and every one of them to be and appear in this court at the time therein named and to show cause, if any there be, why the prayer of this petition should not be granted.

Your petitioner also asks that a jury may be summoned and impaneled to ascertain and determine whether it is necessary for the public benefit to make such separation of grades in accordance with the proposed plan and to ascertain and determine the just compensation to the persons named therein, the parties named in paragraph six and any other persons who may be damaged by said improvement and to assess the compensation and costs and expenses by them awarded against the city of

City of

By

Corporation Counsel.

.....⁴⁹

Corporation Counsel, attorney
for petitioner.

2960 Drainage purposes (Ill.)

(Caption)

To the honorable judges of the circuit court of county:

Your petitioner,, respectfully shows unto your honors, that it is a municipal corporation organized and existing under and by virtue of the laws of the state of Illinois, and as such municipal corporation is authorized to provide for the drainage of said sanitary district by laying out, establishing, constructing and maintaining one or more main channels, drains, ditches and outlets for carrying off and disposing of the drainage, including the sewage of said district, together with such adjuncts and additions thereto as may be necessary and proper to cause such channels or outlets to accomplish the ends for which they are designed, in a satisfactory manner.

That under and by virtue of the laws aforesaid your peti-

⁴⁹ Attach certificate of city clerk and resolution of common council declaring necessity of the change of grades. Also attach agreement ref-

erred to in resolution and the specifications and plans referred to in the petition, as well as ordinance changing the grades.

tioner is authorized and empowered to condemn and take lands in fee, for the purposes aforesaid; that in pursuance of the power conferred on said sanitary district, it has by ordinance properly and duly passed located the route of the main channel of said district, together with the outlets and adjuncts connected therewith; that said route as thus located passes over and across the lands and premises hereinafter described; and said lands are necessary for the construction and maintenance of said main channel, outlets and adjuncts as may be necessary or proper to cause such main channel to accomplish in a satisfactory manner the ends for which it is designed. And your petitioner now seeks to acquire said lands and the right of way for the purpose of building, constructing and maintaining the said main channel over and across said lands and real estate, and that said lands and real estate are situated in the city of, county of, and state of Illinois, and described as follows: (Insert legal description).

Your petitioner further shows that the company, a corporation, the company, a corporation, and the company, a corporation, claim to be the owners of the above described premises or some portion thereof, and to have an interest therein.

Your petitioner further says that it is unable to agree with said parties above named as to the compensation to be paid for or in respect to the above described property.

Your petitioner therefore prays that process may issue pursuant to law to said and the and that the compensation to be made to the several owners and parties interested in the real estate hereinbefore described on account of the taking thereof by your petitioner for the purposes aforesaid, may be ascertained and assessed; and that such further proceedings may be had in the premises as is by statute made and provided.⁵⁰

.....
 Petitioner.
 By.....
 its attorney.

b

(Caption)

To the honorable, judge of said court:

Your petitioner, the of county, by its commissioners, and, shows unto the court here that the said drainage district is a body politic and corporate and is organized under the act of the legislature of the state of Illinois,

⁵⁰ Pittsburgh, Ft. W. & C. Ry. Co.
 v. Sanitary District, 218 Ill. 286.

entitled "An act to provide for the construction and reparation and protection of drains, ditches and levees across the lands of others, for agricultural, sanitary and mining purposes and to provide for the organization of drainage districts," approved and in force May 29, 1879, and all amendatory acts thereto; and that it was duly incorporated and established on the day of, 19.., in this court, reference being made to the records of this court for further certainty; that the said commissioners are the only legally qualified and acting commissioners of said drainage district, and as such commissioners they are authorized to locate and construct drains and ditches and proper outlets for the waters in said drainage district, and that they have each taken the oath of office, as will appear by the said oaths now on file in the office of the county clerk of this county.

Your petitioner further shows that it has located drains and ditches upon and across the lands and premises hereinafter described, as shown by plat marked exhibit "A," which is made a part hereof, and that the said lands and premises are necessary for the construction and maintenance of the said drains and ditches, which said drains and ditches are necessary for the proper drainage of the lands within the boundaries of the said drainage district, and it now seeks to acquire for the purpose of building, constructing and maintaining said drains and ditches, the lands and premises in the county of and state of Illinois, all said lands hereinafter described being in town, range, (west) of the P. M., hereinafter described, to wit:

A strip or parcel of land feet in width (Set forth legal description), said tract containing acres.

Your petitioner further shows that has or claims some interest in and to the premises lastly above described in fee or otherwise, the exact interest being to your petitioner unknown.

Your petitioner files herewith a plat marked exhibit "A," which is made a part thereof and upon which is indicated the location of the land last described desired by your petitioner, said exhibit being marked with defendant's name last aforesaid, and your petitioner refers to said plat for a more definite description and location of the said strip of land sought to be taken.

Your petitioner further avers that it is unable to agree with the said party above named as to the proper or just compensation to be paid by the said drainage district for said described lands and that by reason thereof it has become necessary to institute condemnation proceedings under the law of eminent domain in force in this state. (Insert paragraphs similar to the preceding four as to each owner of property)

Your petitioner further shows that all the property herein-

before described is located in the county of, in the state of Illinois and in township, range, of the principal meridian.

Your petitioner further shows and so states the fact to be, that each and all the different drains and ditches as shown on the plat herewith filed and established as the drains of the said district, are located on the lines of existing ditches, which are water-courses, natural depressions and channels, throughout, and that at the points in said drains where they cross the right of way of the defendant,, there is a natural depression or water-course, and that there is at said crossing places, no bridge or culvert of sufficient capacity to allow the natural flow of water in said ditches or water-courses, and the building of all the ditches and drains shown on the plat herewith filed, is to enlarge the said water-courses; and your petitioner claims and insists upon all rights and privileges as a public corporation, granted it by the act under which it is organized and by the common law, regulating water-courses where same is crossed by railroad companies, exempting it in such cases to pay the necessary expense of building sufficient culverts or bridges in the embankment of any railroad company, where the same crosses any natural water-course, natural depression or channel, where there is not a sufficient bridge or culvert of sufficient capacity to allow the natural flow of water of such ditch, channel, natural depression or water-course.

Your petitioner further shows that at the locations of said drains across the said railroad right of way, there is now and has been for many years, a pipe of about inches in diameter, which your petitioner avers to be wholly insufficient to allow the natural flow of water in said drains.

Your petitioner district in county, Illinois, therefore prays that process may issue to the following named parties as defendants; (Insert names) and that due notice may be given according to law to the owners and parties interested, and that the just compensation to be made to the several owners or parties claiming interest in such property on account of the use thereof by your petitioner, for the purposes aforesaid may be ascertained and assessed; and that such further proceedings may be had in the premises as is by statute made and provided.

And your petitioners will ever pray.

..... Drainage
District of county, Illinois.

By.....

.....

.....

Commissioners of said Drainage District.

.....Attorney.

2961 Fortifications (Md.)

(Caption)

To the honorable the judge of said court:

The petition of respectfully represents unto your honor:

1, That the United States is desirous of acquiring certain land hereinafter described situated at in county, in the state of, for the purpose of erecting thereon certain fortifications, and that the United States cannot agree with the owner thereof as to the price for the purchase of the same.

2, That your petitioner is the duly authorized agent of the United States for the purpose of acquiring said land by condemnation, as will fully appear by a copy of his authorization under the hand and seal of a member of the President's Cabinet, to wit, the honorable secretary of war, which he files herewith marked petitioner's exhibit No. "1."

3, That the United States desires to obtain title to said land for the public purpose of erecting fortifications thereon for the defense of the city of

4, That this land lies at county in the state of, and is bounded and described as follows, to wit: (Give legal description) containing acres more or less. All of which will more fully and at large appear from a map of the said property which your petitioner files herewith marked petitioner's exhibit No. "2."

5, That the name of the owner of said land is, who resides in; that said is an adult and of sane mind; that he is married, but that divorce proceedings are now pending between him and his wife.

To the end therefore that your petitioner may have the said land condemned for the uses and benefit of the United States, your petitioner prays the court that the clerk of this court may give notice of the substance and object of this petition by printed notice to be published once a week for three months in some newspaper printed in the city of, and also by like notice to be published as aforesaid, in one newspaper printed and published in county conformably to section 8 of article 96 of the Code of Public General Laws of Maryland; that said notice, published as aforesaid, shall require all persons interested in said land to come forward on or before the day of, 19.., and file their objections if any they have to the proposed condemnation of the said land.

And as in duty bound, etc.

.....
Attorneys for petitioner and of the United States in accordance with a letter of instructions of the attorney general, a copy of which is filed herewith marked petitioner's exhibit No. "3."

(Verification)

Exhibit "1"

Know all men by these presents, that I,, secretary of war, do hereby constitute and appoint Colonel,, corps of engineers United States army, agent with full power and authority to represent the United States in the matter of applying, under Article XCVI of the Code of Public General Laws of Maryland, adopted March 14, 1888, in any court of the United States in the state of Maryland having jurisdiction of proceedings in such condemnation, for the condemnation of, and of acquiring by condemnation proceedings tracts of land situated respectively at, in the harbor of, state of Maryland, as sites for forts and other works of defense, the tract at to contain about acres, that at to contain about acres, and that at to contain about acres.

Witness my hand and seal of the war department, this day of, 19..

2962 Gas purposes (W. Va.)

(Caption)

To the honorable, judge of the circuit court of county, West Virginia.

Your petitioner, the company, a corporation organized and existing under and pursuant to the laws of said state, respectfully represents unto your honor that it was incorporated on the day of, 19.., for the purpose of producing, distributing and selling gas and oil and other commodities made therefrom for fuel, illuminating and other uses, which purpose included the purchasing or leasing of lands or rights therein, the sinking or drilling of wells thereon and obtaining the oil and gas therefrom, the construction and operation of works and appliances for the manufacture of gas, the erection of tanks and other receptacles for the storage of such gas and oil, the laying of pipes for the distribution thereof, and the doing of such other work and the furnishing of such other materials and appliances as are necessary or convenient in the sale and delivery of such gas and oil; that it is, and for some years has been, engaged in the business of supplying natural gas to the public for fuel, illuminating and other purposes, and that, by virtue of a franchise granted by the common council of the city of on the day of,, to and associates, their successors and assigns, and which franchise has been assigned to petitioner before it undertook to

bring natural gas into said city and is now the property of petitioner, it has the right to lay its pipes in the streets and alleys of said city, which is situate in the said county and to supply natural gas to the inhabitants of said city. That said franchise was granted by an ordinance of the common council of said city adopted on the said day of, a copy of which ordinance is herewith filed and made part of this petition, as if fully set out herein, marked "Ordinance."

Petitioner avers that said accepted said franchise and gave notice of his acceptance thereof in writing to said council within days after the adoption of said ordinance as required by section of said ordinance.

That petitioner, the owner of said franchise, by assignment as aforesaid, brought natural gas into said city and was ready to deliver and did deliver same to customers within months after the adoption of said ordinance, and before delivering any gas under said franchise, the petitioner filed with the then recorder of said city a statement of the price or cost to consumers which it proposed to charge for said gas as required by section of said ordinance by which it agreed to charge not more than cents per 1,000 feet for said gas. That the said franchise is still in effect and has never been revoked, annulled, forfeited to or declared void by said council of said city.

That petitioner under and pursuant to said franchise has occupied the streets and alleys of said city with its said pipes, and for some years has been and is now engaged in supplying natural gas to the citizens of said city of, and to other residents of said county; that it has acquired sundry wells from which it produces natural gas and transports same through pipe lines to its consumers in said city and elsewhere; that among the wells so held by it is one in county, West Virginia, on creek, a pipe line from which runs up creek, across the divide between creek and creek of river and down said creek and across the river, where it connects with another pipe line of said petitioner running to the city of; that for the greater portion of the way down said creek said pipe line runs along and is in the public county road down said creek, permission for that purpose having been granted by the county court of said county; that at several places the said pipe line down said creek runs through a tract of land for many years known as the "..... tract," the legal title to which is held by and, as trustees; that a portion of its supply of gas is derived from wells on said "..... tract" under a lease from the owners thereof; and that petitioner desires and proposes to take for the purpose of constructing and maintain-

ing its said pipe line, parcels of land part of said "....." tract and all situate on said creek in district of said county, which said parcels of land are respectively described particularly, as follows, to wit: Parcel No. 1. A strip of land (Insert legal description).

The said strips of land containing in the aggregate, one-third (1-3) of an acre, more or less.

And your petitioner files herewith as part hereof a plat of said pieces, parcels or sections of lands proposed to be taken, marked "Plat," for identification.

The said center line of parcel No., and nearly all of said parcel, lies within the said county road down creek, and petitioner's pipe line follows said line, the county court of said county having granted the right to so lay its said pipe to petitioner.

Petitioner avers that no dwelling house, yard or garden is upon any portion of the land sought to be taken and that the said pipe line does not pass and no part of the land sought to be taken is within one hundred feet of any occupied dwelling house belonging to the defendants or any of them.

Your petitioner further represents unto your honor and avers that it intends to use the strips of land hereinbefore described for the purpose of constructing, maintaining and operating its said pipe lines, and transporting therewith natural gas for public use, to wit, for the use of the citizens of the city of aforesaid and such other persons living along petitioner's pipe line as may desire to use the same; and that said land is necessary for such purpose, and that such purpose is a public purpose.

Your petitioner further represents and avers that the legal title to the said land is vested in and as trustees for themselves and for in his own right and as trustee in the will of deceased,, and that the respective interest of the said *cestuis que trust* of the said and, trustees, are unknown to your petitioner; that as hereinbefore stated, said parcel No. is covered or partly covered by the public county road down said creek, and that in so much of said parcel No. as is covered by said county road, the county court of county, a corporation, is interested by virtue of the easement of the public in so much of said land as is covered by said road, and the duties and powers imposed upon said county court by law in respect to public roads within said county, and that the said trustees and their *cestuis que trust* and the said the county court of county are, so far as is known to petitioner, the only persons interested in the land proposed to be taken.

Your petitioner finds no liens of other claims upon the said land proposed to be taken.

Your petitioner further represents that it is unable to agree with the said trustees and the said *cestuis que trust* (in behalf of whom said trustees act) as to the amount of compensation for said parcels of land proposed to be taken by petitioner for the uses and purposes aforesaid; that the said parties will not agree to a fair price for said land so proposed to be taken and also refuse to give your petitioner a right of way over said land, but that said county court has consented to the use by your petitioner of said parcel No. so far as it is concerned as hereinbefore set forth; that your petitioner is willing and here offers to pay to the owners of said parcels of land proposed to be taken the sum of (\$.....) dollars which it avers, is more than the said parcels of land are worth.

Your petitioner further avers that the said and, trustees, and their said *cestuis que trust* and each of them are nonresidents of the state of West Virginia, and that it will cause notice to be given to them and to said the county court of county of its intention to file this petition and make this application, as will more fully appear from the notice itself and the evidence of the service, posting and publication thereof which will be filed when duly executed.

Your petitioner therefore prays that commissioners may be appointed by this court to ascertain a just compensation to the owners thereof for the land hereinbefore described and proposed to be taken by your petitioner for the purpose aforesaid, that such other proceedings may be had in the premises as conform to law; and that upon the payment of the compensation by your petitioner, the title to the above described parcels of land and each of them may be vested in your petitioner subject to the easement of the public in that portion of said parcel No. covered by said public road.

And your petitioner also asks such other and general relief as the court may deem proper to award in the premises.

..... company.
By attorneys.

2963 Interurban railway (Ill.)

(Caption)

To the honorable, judge of said court:

Your petitioner, the, respectfully shows that it is a company duly incorporated as such under an act of the general assembly of the state of Illinois, entitled, "An act to provide for the incorporation of associations that may be organized for the purpose of constructing railways, maintain-

ing and operating the same, for prescribing and defining the duties, and limiting the powers of such corporations when so organized," approved and in force March 1, 1872, and all acts amendatory thereof, for the purpose of constructing, maintaining and operating an interurban railway and for the purpose of constructing and operating such interurban railway between the city of, in county, and the city of, in county, and that it is authorized and empowered to construct its line and railroad tracks from the said city of southerly or southwesterly, through the counties of, and, to some convenient point terminating at the city of,, with the right to build and construct all necessary siding, side-track and appurtenances, and other railroad facilities, and to acquire the necessary premises and right of way therefor.

Your petitioner further shows that its said line of railroad has been located in accordance with its charter and that as located, your petitioner's said line of railroad passes over and across part of a strip of land lying between (Designate location) in the village of, county of, Illinois.

Your petitioner further shows that for the purpose of the construction of its said railroad it will be necessary for it to take, appropriate and use for its right of way the following described real estate in said village of, to wit: (Insert legal description of the property necessary to be taken).

Your petitioner further avers that said strip of land is owned by said in fee.

Your petitioner herewith files a plat marked exhibit "A" and made a part hereof, on which is indicated the strip of land desired by your petitioner; and your petitioner further refers to said plat for a more definite description and location of the said strip of land sought to be taken by it.

Your petitioner further avers that it has made an effort to agree with the owner of said strip of land upon a compensation to be paid for and in respect of the property sought to be so appropriated, taken and used for the purposes aforesaid, but that it has been unable to agree with said defendant as to the proper and just compensation to be paid by petitioner therefor, and that by reason thereof it has become necessary to institute condemnation proceedings under the law of eminent domain in force in this state.

Your petitioner therefore prays that summons may issue to the said, a corporation, commanding said to appear before this honorable court, on the day of, 19.., at o'clock .. M., of said day; that a jury may be empaneled to ascertain the just com-

pensation and damages to be paid by your petitioner to the owners of or parties in interest in the said strip of land above described sought to be taken by your petitioner, as the rights of said owners or parties in interest may appear, in accordance with the statutes of this state relating to eminent domain, and upon said damages being ascertained and paid as required by law, that your petitioner be let into full possession of said premises for the purposes aforesaid; and that your petitioner may have such orders as may be necessary and in accordance with the laws of this state.

And your petitioner will ever pray, etc.

.....
By.....
its attorneys.

2964 Parks, Federal (D. C.)

In the supreme court of the District of Columbia,
Holding a Special Term as a District Court
No.

In the matter of the condemnation of squares numbered
..... and, in the city of Washington in the
District of Columbia, for the use and accommodation of the
United States for continuing the improvement of

The petition of the United States by, attorney
of the United States in and for the District of Columbia, act-
ing in that behalf for the attorney general, respectfully repre-
sents:

That by an act of Congress approved the day of
....., entitled, "An act making appropriations for sundry
civil expenses of the government for the fiscal year ending
.....,, and for other purposes," it is among
other things provided as follows: For continuing the improve-
ment of (Describe the same) according to plans prepared in
the office of public buildings and grounds, including the
acquisition by purchase or condemnation of squares
and in the city of Washington, to be expended under
the direction of the officer in charge of that office,
dollars." (page of public document No., a copy
of which is filed herewith and marked exhibit No. "1.")

That by virtue of said act aforesaid, the said officer in charge
of public buildings and grounds, finding that he was unable
to acquire said property by purchase at a reasonable price,
and having made due effort to that end, and in his opinion it
being necessary and advantageous to the government to ac-
quire title thereto by condemnation, accordingly on,
....., informed the secretary of war of that fact and rec-
ommended that the papers be transmitted to the attorney gen-
eral with the request that the United States attorney for the

District of Columbia be instructed to institute and conduct proceedings in condemnation for the acquisition of title to said land; and on, the secretary of war so requested the attorney general; a copy of said letter addressed to the secretary of war and the reference by the secretary of war to the attorney general being filed herewith and marked exhibit No. "2."

That on, the attorney general directed and authorized these proceedings to be commenced.

In order that the said property aforesaid may be acquired by the United States in accordance with the provisions of said act, it is necessary that proceedings of condemnation should be instituted to acquire said parcels of land upon a basis of a fair compensation therefor. A particular description of said pieces and parcels of land comprising the said several squares sought to be acquired, together with the names of the owners, occupants, and persons claiming to own the same, is as follows:

Parcels in the square number

Parcel number 1.

Owner: Record shows title in the United States; also deed dated by to, and further conveyance by said to Any interest conveyed by these deeds would be in the heirs of, who are unknown.

Outstanding tax title interest to of said parcel in the heirs of; parties unknown.

Outstanding tax interest in the heirs of who are, residence unknown.

Description: (Give full legal description).

Improved by (Describe general character of building).

Occupant:, residence, the southwest corner of street,

Parcel number 2.

(Proceed in the same manner as before until all of the property to be condemned is covered)

Plat of the land hereby sought to be condemned is filed herewith and made a part thereof, and marked exhibit No. "3."

Petitioner represents that if a further examination reveals any inaccuracies of description in said parcels of land or the owners thereof or other persons interested therein, or that amendment in any other respect is essential, application will be made to the court for leave to amend as may be proper, requisite and necessary.

The petitioner therefore prays the court: 1, To cite and notify the owners, occupants, and all other persons interested or claim-

ing an interest in each parcel of land in said squares, to appear at a time to be fixed by this court and to answer this petition; and to cause public notice thereof to be given. 2, To appoint three capable and disinterested commissioners to appraise the value of the respective interests of all persons concerned in said parcels of land, under such regulations as to notice and hearing as to the court shall seem meet. 3, To take such further action, pass such orders, and give such directions as may be proper, requisite and necessary to carry into complete effect the acquisition by the United States of the fee simple title in and to all singular the land and premises included in the squares aforesaid.

.....
Attorney for the United States in
and for the District of Columbia.

2965 Public roads (W. Va.)

(Caption)

To the honorable circuit court of county,
West Virginia:

The county court of county, West Virginia, a corporation, respectfully represents unto your honor that it proposes to build, construct and maintain a public road for the use of the general public, in and districts, county, West Virginia, as it is authorized to do; that it desires to proceed with the construction of said road through the lands of the following named persons.....
..... who are joint owners of one of the tracts of land over and through which the said road is to pass, lying in the districts of and in said county; and that the land proposed to be taken in this proceeding belongs to and is described as follows: beginning at a point (Give legal description) being a strip of land feet wide from place of beginning to said line, and continuing square rods.

Your petitioner files herewith as a part hereof a plat of said piece, parcel or section of land proposed to be taken, which is marked "Plat," for identification.

Your petitioner further represents and avers that it intends to use the land hereinbefore described for the purpose of constructing and maintaining a road for the use of the public, and that the said land is necessary for that purpose.

Your petitioner further represents and avers that and are the only owners of said land marked on the plat herewith filed, "..... land," and are owners of the land sought to be condemned in this proceeding, being joint owners thereof, so far as it is known to it, that the nature of said ownership is in fee.

Your petitioner finds no liens on said land of any kind.

Your petitioner further represents that resides in county, West Virginia, and that resides in the state of Missouri.

Your petitioner further represents that it is unable to agree with the said and, the owners of said land proposed to be taken from them, by it for the public use and purposes aforesaid, as to the amount of compensation for said parcel of land so proposed to be taken from them: that the said parties will not agree to a fair price for said land proposed to be taken from them.

Your petitioner further represents and avers that it has caused notice to be given to said and of its intention to file this petition and make this application, as will more fully appear from said notice itself, and the evidence of service thereon indorsed and therefrom appearing, and the publication of said notice as to, as will appear from the copy of the publication with the certificate thereto attached, and said notices are marked "A" and "B" respectively, and made a part of this petition.

Your petitioner therefore prays that commissioners may be appointed by this court to ascertain a just compensation to said and for the land hereinbefore described and proposed to be taken from them by your petitioner for the purpose aforesaid; that such other proceedings may be had in the premises as conform to law; and that upon the payment of the compensation your petitioner may take the land, establish said road and build and maintain the same for the use of the public, and your petitioner asks such other, and general relief as the court may deem proper to award in the premises and that may be necessary.

The county court of county, West Virginia.

By, its attorney.

2966 Railroad right of way (Ill.)

(Caption)

Your petitioner, respectfully shows unto your honors that it is a corporation duly organized and existing under and by virtue of the laws of the state of Illinois, and as such corporation is authorized to locate, construct, maintain and operate a railroad in the county of and state of Illinois, commencing at a point on the west shore of lake, between the main branch of the river on the north and street, in the city of, county of, and state of Illinois, on the south, thence running in a westerly direction to the present western limits of the town of, in said county and state, with a branch starting from the main line of said railroad, as above described, at a point on said main line between street in said city of, on the

west, and running southerly and southwesterly to the present city limits of said city of; and also with a branch starting from said main line, at a point between the south branch of the river on the east, and avenue on the west in said city of, and running northerly and northwesterly to the present city limits of the city of; with a further authority to take and appropriate such lands as may be necessary for the building and operating of its said railroad with two or more, not exceeding four tracks, with such stations, curves, spurs, side-tracks, switches, sidings, turnouts, connections, supports, columns, girders, telegraphs, telephone and signal and other devices as said company may deem necessary or proper.

And your petitioner further shows that it has located its right of way over, upon and across the lands and premises hereinafter described, and that the said right of way is necessary for the construction and maintenance of its railroad as aforesaid; and your petitioner now seeks to acquire a right of way for the purpose of building, constructing, operating and maintaining its said railroad with its said appurtenances over, upon and across the lands and premises in the city of, county of, and state of Illinois, hereinafter described, to wit:

Said lands and premises and the names of all persons interested therein either as owners or otherwise, as appearing of record, and the names of the tenants, lessees and occupants thereof, are as follows, to wit: (Give the legal description of parcels of land).

And the names of the persons interested in said described premises, as owners or otherwise, as appearing of record, are as follows, to wit: (Give names).

And the names of the tenants, lessees and occupants of said premises are as follows, to wit: (Give names).

All of said above described lots, pieces and parcels of land, premises and property being situated in the city of, county of and state of Illinois.

Your petitioner further shows that there are other persons interested in said above described lands and premises whose names are unknown to your petitioner, and who claim to have an interest in said above described premises, and your petitioner asks that said persons be made parties defendant hereto by the description of unknown owners.

Your petitioner further shows that it is unable to agree with said parties, who are above named, as to the compensation to be paid for or in respect of the premises in which they are respectively interested.

Your petitioner therefore prays that process may issue to the parties above named as defendants; that due notice according to law may be given to the owners and parties inter-

ested and the unknown owners of said lands and premises aforesaid; that the compensation to be made to the several owners or persons claiming interest in said property on account of the use thereof by your petitioner for the purposes aforesaid, may be ascertained and assessed; and that such further proceedings may be had in the premises as is by the statute in such case made and provided.

By
its attorney.

(Maryland)

(Caption)

To, esquire, justice of the peace of the state of Maryland, in and for the county of

Whereas, the cannot agree with of county, Maryland, a corporation incorporated under the general laws of Maryland, for the purchase or use and occupation of the land owned by it situate in the district of county aforesaid, and hereinafter more particularly described, wanted for the construction or repair of its railroad or any of its works, and necessary for the same, which land is described as follows, that is to say: (Insert legal description) containing an area of acres more or less, and is more particularly shown on the plat hereto annexed and made a part of this application by the lines shaded yellow thereon, being a part of the land more particularly described in a deed from, et ux., to the said of county, Maryland, dated the day of, and recorded among the land records of county in liber, No., folio;

Now, therefore, application is hereby made to you to issue your warrant, under your hand and seal, directed to the sheriff of said county, commanding him to summon a jury of twenty inhabitants of said county not related nor in any wise interested, to meet on said land on a day to be named in your warrant, not less than ten and not more than twenty days after issuing the same, to value the damages which the said owner of said land first above described will sustain by the use and occupation aforesaid, according to the provisions of the act of the general assembly of Maryland incorporating the said company, being the act of, chapter, together with the supplements and amendments thereto, and including the act of, chapter, relating to the said railroad company, together with the supplements and amendments thereto.

Attorney for the railroad company.

(Virginia)

To the honorable, judge of the circuit court of county.

Your petitioner, the, respectfully represents the following case:

1, That it is a railroad corporation organized and doing business under the terms and provisions of an act of the general assembly of the state of Virginia, entitled "An act concerning corporations," which act became a law on the 21st day of May, 1903, and having the right to purchase, lease or construct, maintain and operate a railway as follows: (Insert powers relative to the location and operation of the railroad), as will appear from the articles of association certified by the state corporation commission to the secretary of the commonwealth for record, on the day of, and duly recorded in the office of the said secretary of the commonwealth on the said day of

2, That pursuant to the rights, privileges and franchises as set forth in said articles of association, and the general laws of the state of Virginia made and provided, your petitioner has proceeded with the work necessary for the construction of its railway, completed its surveys, and permanently located the line of the proposed road from the city of to the town of, in the county of

3, That your petitioner desires for the uses and purposes of the company, to wit, to be used as a part of its main line right of way, so located as aforesaid, a fee simple interest in that certain piece or parcel of land in the county of, belonging to, whose residence is on said tract of land, which said piece or parcel of land may be more particularly described as follows: (Give legal description of the property) and containing acres, more or less. That the said is the only party interested in said tract, so far as your petitioner is advised.

4, Your petitioner herewith submits a plat of the survey, with a profile showing the cuts and fills, trestles and bridges, together with a complete description of the said tract, and a memorandum showing the name and residence of the owner, so far as known to your petitioner, the same being marked exhibit "A" and filed as a part of this petition.

5, That your petitioner has been unable to agree with the said on the terms of purchase of his interest in said land so to be taken and used in the construction of said road.

Your petitioner, therefore, prays that this honorable court will, in accordance with the statute⁵¹ in such case made and

⁵¹ It is doubtful if the statutory provision which authorizes the assessment of damages by a commission against a land owner's consent is constitutional.

provided, appoint five disinterested freeholders, residents of this county, any three or more of whom may act, who shall ascertain and report what will be a just compensation for the land, or interest in the land, of the said thus sought to be acquired by your petitioner, and award the damages, if any, resulting to the adjacent or other property of the owner, or the property of any other person, beyond the peculiar benefits that will accrue to such properties respectively from the construction and operation of your petitioner's works as aforesaid; and that all other necessary orders may be entered to effectuate the purposes of this petitioner as aforesaid.

.....
By.....
its counsel.

(Venue)

I,, a notary public in and for the state of Virginia and city aforesaid, do hereby certify that this day appeared before me in my city aforesaid, and made oath that he is a director of the, and that the matters and things set forth in the aforesaid petition, so far as stated on his own knowledge are true, and so far as stated on the information derived from others, he believes them to be true.

Given, etc.

Exhibit "A"

Filed as part of the petition in v., and all others whom it may concern.

A plat of the survey with profile, showing cuts and fills, trestles and bridges and a description of the land sought to be acquired in these proceedings is annexed hereto.

Residence of owner, or owners, of the property sought to be condemned is stated in the petition.

(Attach survey)

2967 Side-tracks (Ill.)

(Caption)

To the honorable, the judges of said, court.

Your petitioner, the railroad company, respectfully represents unto your honors:

1, That it is a corporation duly organized under and by virtue of the laws of the state of Illinois, by consolidation entered into between the corporations heretofore existing under the laws of the state of Illinois, known respectively as the railroad company and railroad company, the several certificates of said consolidation being filed and recorded in compliance with law as follows, to wit, the certificate of the railroad company filed in the office of

the recorder of deeds of said county on the day of, 19.., and duly recorded in book of records, on page, and also filed in the office of the secretary of the state of Illinois on the day of, 19.., and recorded in book of railroad records on page; the certificate of railroad company (Proceed as before).

2, That the said railroad company was organized by the adoption of articles of incorporation on the day of, 19.., under the act of the general assembly of the state of Illinois, which was approved and went into effect on the last day of March, 1872, entitled "An act to provide for the incorporation of associations that may be organized for the purpose of constructing railways, maintaining and operating the same; for prescribing and defining the duties and limiting the powers of such corporations when so organized," as said act had been amended; which articles of incorporation were recorded in the office of the recorder of deeds of said county on the day of, 19.., in book of railway corporations, on page, and in the office of the secretary of the state of Illinois on the day of, 19.., in book of railroad corporations on page, to which reference is prayed; and thereby and by reason of the consolidation aforesaid, this petitioner has power and authority to construct, maintain and operate a line of railroad, and that it has constructed, maintained and operated and is now operating its said line of railroad in accordance with its charter.

3, That its said line of railroad runs from a point on the boundary line between the states of and, called state line, and from the town of in township in county, in said state of, to its terminus at, in the city of, in said county, and as thus located and constructed runs along and upon the western portion of the premises known as (Describe same).

4, That already this petitioner has constructed and has in operation to the west of the property hereby sought to be condemned, its main tracks and its passenger station; and that it desires to appropriate and use, and it is necessary for the petitioner to take and have for side-tracks and switch-tracks and for its railroad uses and purposes, the following described real estate situated in the city of, in the county of and state of Illinois, to wit: (Insert description).

5, That said lot is vacant, and that there is located upon said lot a story and basement brick dwelling house now occupied as a for

6, That is the owner of said real estate and parcel of land in fee simple, and that

is temporarily in possession of said and claims to have some interest therein.

7, And that this petitioner has been unable to agree with the said owner of said property as to the compensation which should be made to him for the taking thereof by it as aforesaid.

This petitioner therefore prays that the compensation to be made to the owner or owners of said land and property on account of the appropriation thereof by it may be ascertained in the manner provided by law; that the said and may be summoned as defendants herein; and that such further proceedings may be had in the premises as are by the statutes of this state made and provided.

May it please this honorable court to grant the writ of summons commanding the said defendants and to be and appear before this honorable court upon the day of the next term thereof, then and there to abide by the orders of this honorable court.

And your petitioner will ever pray.

..... railroad company.

By
its solicitor.

.....
Solicitor for petitioner.

2968 Street opening (petition upon appeal) Md.

| | |
|---|-----------------------|
| | } In the court. |
| v. | |
| The mayor and city council of | |
| and the commissioners for opening streets. | |

From the assessment of benefits by the commissioners for opening streets and the act of the mayor and city council of in the opening of street.

To the honorable, the judge of said court.

The petition and appeal of respectfully represents unto your honor:

1. That your petitioner is the owner in fee of an undivided one-..... interest in a lot of ground in the city of through which the commissioners for opening streets propose to open a street sixty-six feet wide as hereinafter stated.

2. That on the day of, 19.., the commissioners for opening streets, acting under ordinance of the mayor and city council of, No., approved the day of, 19.., deposited in the office of the register of the city of a statement with maps and other accompanying exhibits showing damages awarded and benefits assessed in the condemnation of certain property

in the city of for the opening of street.

3. That by reference to the plat marked A and B, filed with said commissioners' return, will be found a lot designated on said plat as lot No. ..., in which your petitioner owns an undivided one-..... interest in fee; the same beginning at the intersection of the center of avenue with the north side of street as proposed to be opened, fronting easterly on the north side of street as proposed eighteen feet, four inches with an irregular depth northerly; and in said commissioners' corrected report of damages and benefits said lot is charged with benefits in the sum of (\$.....) payable by "..... and"

4. That your petitioner feels aggrieved by said assessment of benefits, claiming that the same is unequal, unreasonable and unjust, and your petitioner further objects to said assessment because of its inaccuracy and uncertainty.

5. That there is no authority in law for the condemnation of the land proposed to be taken for the opening of said street and that the proceedings thereunder are null and void.

Wherefore your petitioner prays an appeal to this honorable court as provided by the Act of 1898, chapter 123 from said assessment of benefits of the commissioners for opening streets for the lot above mentioned, and he prays that the validity of the action of said commissioners for opening streets be inquired into by this court and that the action of said commissioners in opening street, assessing benefits and awarding damages as hereinabove set forth may be reviewed by this court and declared null and void; and that process may issue accordingly.

And as in duty bound,

.....,
Petitioner.

.....
Attorney for petitioner.

(Venue)

I hereby certify, that on this day of, 19..., before me, the subscriber, a notary public of the state of Maryland, in and for the city aforesaid, personally appeared, and made oath in due form of law that the matters and facts stated in the foregoing petition are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

[Seal]

.....,
Notary Public.

Order

(Caption)

On the foregoing petition and appeal it is this day of, 19.., by the, ordered that the day of, 19.., be and the same is set apart for the hearing of said appeal as to lot number above described; and it is further ordered that the clerk of this court be and he is hereby directed to issue a subpoena *duces tecum* to register of the city of, returnable on the day of 19.., requiring him to produce and deliver to this court the record of said commission in the above entitled case, and all papers, plats, documents and maps connected with such records; and also to issue such other subpoena for witnesses as is required by either of the above parties or their attorneys.

(Attach an election for a jury trial)

2969 Filing, effect

The rights and interests of parties date from the time of the filing of the condemnation petition,⁵² and the value of the property is fixed as of that date.⁵³

2970 Dismissal

Until a final judgment is entered as to all of the defendants the petitioner has the right, under the Illinois Local Improvement act to dismiss his petition without the consent of the parties whose lands are sought to be condemned.⁵⁴

CITATION, NOTICE AND PUBLICATION

2971 Citation order (D. C.)

(Caption)

Upon consideration of the petition filed by the United States through, United States attorney, on behalf of the attorney general of the United States, seeking condemnation of all of squares numbered and in the city of Washington, in the District of Columbia, it is by the court this

⁵² *Dowie v. Chicago, Waukegan & North Shore Ry. Co.*, 214 Ill. 54.

⁵³ *Sanitary District v. Chapin*, 226 Ill. 499 (1907).

⁵⁴ *Evanston v. Knox*, 241 Ill. 460, 468 (1909).

..... day of, 19.., ordered that a notice of citation be issued to the parties herein interested returnable on the day of, 19.., and that in case any of the parties to this proceeding cannot be found that said notice be attached to the premises, and that the United States attorney in and for the District of Columbia make inquiry as to the last known residence of the parties and if the same can be found serve a notice or citation upon said parties either through the proper marshal or a person named by the United States attorney or by mailing a copy to said parties; and in case said notice or citation is served by mail by the United States attorney evidence of the service thereof shall be by affidavit of the said United States attorney or any one representing him; and in case said service is made by the proper marshal his return shall be sufficient evidence of what he has done in regard thereto; and besides said notice or citation, publication of the order shall be made in manner hereinafter ordered, giving notice to the parties to appear in court on or before the said date.

By the court,

.....
Justice.

2972 Citation (D. C.)

(Caption)

The President of the United States of America, to (Insert names), greeting.

You are hereby notified that under and in conformity with the terms and provisions of a certain act of Congress of the United States, approved the of, 19.., entitled, "An act making appropriations for sundry civil expenses of the government for the fiscal year ending, 19.., and for other purposes," a petition for the condemnation of all of squares numbered and in the city of Washington, in the District of Columbia, in which you are interested, has been filed in this court; therefore, you are hereby commanded to appear in said court and make answer to the petition aforesaid on or before the first day of, 19.., at .. o'clock ...noon, at which time the court will proceed with the matter of the condemnation of said squares.

Witness the honorable, chief justice of the said court, the day of, 19..

.....
Clerk.

By
Assistant Clerk.

[Seal]

Return

Served copy of the annexed writ on the following named persons and corporations upon the date and in the manner set opposite their respective names.

| Date of service | Person served | How served |
|-----------------|-------------------------|--|
| | A B C D E company | Not found Personally By service on F, president |

Also attached a copy of said writ on each and every of the premises mentioned and described in the petition in this cause this day of, 19...

.....
Marshal.

2973 Notice (Ill.)

State of Illinois, }
..... county. } ss.

The people of the state of Illinois, to

You are hereby notified that a jury has been called to meet before the county judge of the county court of the county of, state of Illinois, at the court house in said county, on the .. day of, 19..., at .. o'clock, for the purpose of assessing damages for each of you in the matter of drainage district in counties and state of Illinois, when and where you can appear and assert your rights if you desire.

Dated, etc.

.....
Clerk of the county court
of said county
and state of Illinois.⁵⁵

(Maryland)

....., Esquire,

Sheriff of county.

You are hereby directed to serve the following and annexed notice on each owner named in the foregoing application, by delivering a copy of the same to every such owner, if such owner can be found within the state of Maryland, and if not

⁵⁵ The foregoing notice was held sufficient under Sec. 57 of the Drainage act. *Waite v. Green River*

Drainage District, 226 Ill. 207, 209 (1907).

found within said state, then serve said notice by delivering a copy thereof to such owner wherever found.

.....
Attorneys for said company.

(West Virginia)

To

You and each of you will please take notice that on the day of, 19.., a petition will be filed and application will be made to the circuit court of county, West Virginia, then to be in (special session), at the court house thereof, for the appointment of commissioners to ascertain a just compensation be paid to you, and each of you, for a certain piece, parcel or section of land hereinafter mentioned, in which you are interested as owners in fee thereof, and for such orders and proceedings to be then and there entered and had as may be necessary to condemn the same for public use and purposes hereinafter named; the said piece, parcel or section of land is bounded and described as follows, to wit: (Set forth description as in petition). The plat of said land, marked "....." is filed with the application in writing in this case, and shows the center line of the public road to be established on said land and which piece, parcel or section of land is proposed to be taken by the county court of county, West Virginia, to be appropriated and used for a public road in district in said county.

The county court of county, West Virginia.

By, its attorney.

b

To (Name parties):

You will please take notice that on, the day of 19.., an application by petition will be made by the undersigned company to the circuit court of county, West Virginia, at the term, 19.., thereof to be held at the court house for the appointment of commissioners to ascertain a just compensation to the persons entitled thereto for certain pieces, parcels or strips of land hereinafter mentioned, in which you are interested as owners thereof, and for such other orders and proceedings to be then and there entered, and had as may be necessary to condemn the same for the public use and purpose hereinafter named; the said pieces, parcels or section of land being respectively, bounded and described as follows, to wit:

Parcel No. 1. A strip of land feet long and feet in width, being in line feet on each side of a center line beginning at a point (Proceed with description and enumerate and describe the other parcels in similar manner).

A plat of said parcels of land marked "Plat" is filed with the application in writing in this proceeding in the office of the clerk of said court and said pieces, parcels or strips of land are proposed to be taken by the company, a corporation duly created, and acting under and by virtue of the laws of West Virginia, and are intended by said company to be appropriated for the purpose of constructing, operating and maintaining, a pipe line for transporting natural gas for public use.

..... company,
By, attorneys.

2974 Notice, return, amendment

The return upon a notice for the filing of a petition for condemnation is amendable after the term had passed at which judgment was entered, to show the truth of what was actually done in the way of service, where the rights of third persons, acquired in good faith, have not intervened.⁵⁶

PUBLICATION

2975 Affidavit of nonresidence (D. C.)

(Caption)

..... first being duly sworn, deposes and says that he is the United States attorney in and for the District of Columbia, and is charged with the condemnation of the squares mentioned in this case; that he has made inquiry as to the last known places of residence of the parties named in the citation issued in this case who have an interest in squares numbered and herein, and that he has sent or caused to be sent, to the addresses given opposite the following names, copies of said citation: (Insert names).

That he has made diligent search and has been unable to find the following: (Insert names).

That he has made diligent search, and has been unable to find the places of residence of the following named parties: (Insert names).

That he has made diligent search, and finds that the following parties are deceased: (Insert names).

.....

Subscribed, etc.

2976 Order (D. C.)

(Caption)

Upon consideration of the petition filed herein by the United States of America through, on behalf of the attorney

⁵⁶ Waite v. Green River Drainage District, 226 Ill. 212.

general of the United States, seeking the condemnation of all of squares and in the city of Washington, in the District of Columbia, for the use and accommodation of the United States for continuing the improvements of, in conformity with the act of Congress approved, 19.., entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending,, and for other purposes," it is by the court this day of, 19.., ordered that (Insert names) and all other persons owning, occupying or claiming any title, interest or lien in or upon any of the said several parcels of land situated in the said squares aforesaid, which are sought to be condemned herein, be and they are hereby required to appear in this court and answer the exigencies of the said petition on or before the first day of, 19.., at o'clock noon, at which time the court will proceed with the matter of the condemnation of the above described parcels of property; provided, however, that a copy of this order be published twice a week for five weeks commencing, 19.., in the and the, and once a week in the..... for four weeks.

By the court,

.....
Justice.

b

It is ordered, this day of, 19.., that the order of the publication heretofore issued and published once in the and the, be amended by adding the following names:, and, minor; and that said publication be continued as heretofore ordered.

By the court,

.....
Justice.

(Maryland)

(Caption)

Upon the foregoing petition and exhibits it is ordered by this court this day of, 19.., that the clerk of this court be and he is hereby directed, to give notice of the substance and objects of the foregoing petition by printed notice to be published once a week for three months in some newspaper printed in the city of, and also by a like notice to be published as aforesaid in one newspaper printed and published in county, in the state of Maryland; and the clerk is further directed to insert in said notice a descrip-

tion of said land and the name and residence of the owner thereof and the fact that said owner is of sane mind as stated in the foregoing petition and to state the public use for which said land is desired by the United States, as set forth in the foregoing petition; and the clerk is further directed to require in said notice that all persons interested in said land shall come forward on and file their objections, if any they have, to the proposed condemnation of said land.

.....
Judge.

(Virginia)

(Caption)

It appearing to the court that the company has this day filed under the provisions of the act concerning the exercise of the right of eminent domain, a petition for the appointment of commissioners of this court against the above defendants, or others whom it may concern, and that there is no newspaper published in the county of, it is ordered that the notice of application for appointment of commissioners provided for in said petition, be published in the, a newspaper published in the city of, Virginia.

2977 Publication notice (D. C.)

(Caption)

Notice is hereby given that the commissioners of the District of Columbia, pursuant to the provisions of an act of Congress approved February 23, 1905, entitled "An act to amend chapter 55 of an act entitled 'An act to establish a code of law for the District of Columbia'" have filed a petition in this court praying the condemnation of the land necessary for the opening of an alley through part of block numbered and part of block numbered in the District of Columbia, as shown on a plat or map prepared by the surveyor of the District of Columbia and filed with said petition, as part thereof; and praying, also that a jury of five judicious, disinterested men, not related to any person interested in these proceedings and not in the service or employment of the District of Columbia, or of the United States of America, to be summoned by the United States marshal for the District of Columbia to assess the damages each owner of land to be taken may sustain by reason of the opening of the aforesaid alley and the condemnation of the land necessary for the purposes thereof, and to assess the benefits resulting therefrom including the expenses of these proceedings, as provided in the aforesaid act of Congress, it is by the court, this day of, 19.., ordered that all persons having any interest in these proceedings be,

and they are hereby warned and commanded to appear in this court on or before the day of, 19.. at ..o'clock in the ...noon, and continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits of the jury to be impaneled and sworn herein; and it is further ordered that a copy of this notice and order be published once in the and once in the, and the newspapers published in said District before the said day of, 19..; and it is also ordered that a copy of this notice and order be served by the United States marshal for said district or his deputies, upon such owners of the fee of the land to be condemned as may be found by said marshal or his deputies, within the District of Columbia, before the said day of, 19...

By the court,

.....
Justice.

Return

Served a copy of the within order on the following named persons owners of the land to be condemned, to wit: (Give names). All other owners of land to be condemned not found this day of, 19...

.....
Marshal.

(Maryland)

(Caption)

To, county, Maryland, owner:

Take notice that company, a corporation incorporated under an act of the general assembly of Maryland,, chapter, together with the supplements and amendments thereto, and including the act of, chapter, together with the supplements and amendments thereto, relating to the railroad company, has duly applied to, esquire, a justice of the peace of the state of Maryland, for county, for his warrant to the sheriff of said county, to summon a properly qualified jury to condemn for the use and occupation by said railroad company and wanted for the construction or repair of its branch or any of its works, and necessary for the same, under its charters, the following land, that is to say, all that part of (Insert legal description), containing acres more or less, and is more particularly shown on the plat annexed to and made a part of said application, as shaded by the yellow lines.

And the said jury will meet on said land on the day of

..... 19., at o'clock A. M., for the purpose of valuing the damages which said owner will sustain by the use and occupation aforesaid.

..... company,
By,
its attorney.

(Virginia)

(Caption)

To the company, and all others whom it may concern :

Not being able to agree with you upon the price or terms of purchase for the fee simple interest in the land of the freehold whereof you are the tenant, wanted for the purposes of the railway company, notice is hereby given you, as provided by law that railway company, a corporation, duly authorized so to do, will on the day of, 19., make application to the circuit court of the county of for the appointment of five commissioners to ascertain what will be a just compensation for the fee simple interest in the land whereof you are the tenant, proposed to be condemned for the uses of the said railway company, and to award the damages, if any, resulting to the adjacent or other property owned by you, or to the property of any other person, beyond the peculiar benefits which will accrue to said property from the construction and operation of the company's works. The land, the fee simple interest in which is wanted by the said railway for its purposes, and desired to be condemned by it, being particularly described as follows: (Insert legal description), and containing acres, more or less.

For a further description of said property, together with plat showing the proposed work with bridges, trestles, cuts and fills, if any, reference is hereby made to the plat of the survey and profile filed with the petition of the railway company on the day of, 19., in the clerk's office of the circuit court of county.

2978 Certificate (W. Va.)

(Venue)

Personally appeared before the undersigned authority in and for the said county of, this day of, 19., who being by me first duly sworn did depose and say that he is the president and manager of the ".....," a newspaper of general circulation printed, published and circulated in said county; that the notice of publication hereto annexed, was published in said newspaper for the period of (four weeks) next preceding the day of 19.,

the first publication thereof having been made as aforesaid on the .. day of, 19.., and the last on theday of, 19.., and that a copy of the same was posted at the front door of the court house of said county for the like period.

Taken, sworn to and subscribed before me in my said county, this day of, 19...

.....
Notary Public.

APPEARANCE, REMOVAL, MOTIONS, DEMURRER

2979 Appearance, admission

A general appearance in a condemnation proceeding waives any irregularity in the service of process.⁵⁷ So, by appearing and consenting to the selection of a jury and contesting the case on the merits, a defendant admits the averment in the petition that the petitioner was unable to agree with him upon the value of the land sought to be taken.⁵⁸

2980 Appearance (Ill.)

(Caption)

And the said defendants, and, by their attorneys, hereby enter their appearance in the above entitled cause and demand a trial by jury of their rights and interests in the premises.

b

And now comes A and S, defendants in the above entitled cause, by, their attorney, and enter their appearance in the above cause, and state and show to the court that they and each of them are holders of valuable leasehold interests in the premises, situate and known as (Give general, not legal, description of property). They therefore respectfully request that their rights and interests in the premises in question may be protected by this honorable court, and that just compensation shall be made for the taking of said property.

.....
Attorney for certain defendants.

2981 Removal of cause, practice

An application for the removal of a condemnation proceeding must be made, under Illinois practice, on the day upon which the summons or notice of publication is made returnable.⁵⁹

⁵⁷ Eddleman v. Union County Trac-
tion & Power Co., 217 Ill. 412.

⁵⁸ West Skokie Drainage District
v. Dawson, 243 Ill. 175, 177. (1909).

⁵⁹ South Park Commissioners v.
Ayer, 237 Ill. 211, 215 (1908).

2982 Motion for plans (Ill.)

(Caption)

Motion for plans, profiles and specifications of proposed ditches and drains proposed to be built and constructed by the petitioner on, across and through the lands of the defendants.

Now comes, impleaded defendants in said entitled cause, by and, their attorneys, and ask this honorable court to require said petitioner, the drainage and district of county, Illinois, to file on or before morning,, 19.., a full, complete and exact plan, profile and specification of proposed ditches and drains proposed by it, the said petitioner, to be built, dug and constructed across, on and through the lands of each and every of said named defendants.

And for cause of this motion they say that there is nothing contained in the petition now on file in said entitled cause, or in the annexed plat, that shows or attempts to show the width and depth of the ditches proposed to be dug, built and constructed across the farm lands of any of these defendants; that there is nothing in said petition contained that shows the disposition proposed to be made by the petitioner of the earth and other materials excavated in digging, building and constructing the ditches proposed by said petitioner; and that said defendants and each and every of them are unable to make a sufficient defense to this proceeding because of the complete failure of the petitioner to show the form, manner and extent of the way said petitioner proposes to dig, build and construct its proposed ditches and drains.

Wherefore, said defendants and each and every of them respectfully ask this honorable court for a rule requiring said petitioner to file, on or before, a full complete and exact plan, profile and specification of its proposed drains and ditches on, through and across the lands of each and every of said defendants, and that the same when filed, shall contain an accurate statement of the width and depth of the ditches and drains proposed to be constructed on lands of each and every of the said defendants, and show the heighth of the embankment to be made therein by the removal of the dirt and other material excavated in digging, building and constructing said proposed ditches and drains.

.....
Attorneys for defendants.

2983 Motion for guardian ad litem; appointment (D. C.)

(Caption)

Upon application in that behalf made, and it appearing to the court that and, infants under the age of years, have been served with process in this cause,

as and respectively, and that the said infants cannot appear personally in court without great inconvenience to themselves, it is, this day of, 19.., ordered that be, and she is hereby appointed as guardian *ad litem* for the said and the said, to represent their interests in this proceeding, and the personal appearance of said minors, for the purpose of the making of this order, is hereby dispensed with.

By the court,

.....
Justice.

2984 Motion to quash (Md.)

(Caption)

The appellant respectively moves to quash and set aside these proceedings to open street.

1. Because the ordinance, under and by color of which they are undertaken, is void on account of the preliminary plat filed for the opening of said street in the office of the commissioners for opening streets prior to the passage of the ordinance, not containing on it a certain school house belonging to the city of, as by law it should have done.

2. Because the commissioners for opening streets before proceeding to perform their duties under the ordinance for opening street, did not give thirty days' notice as required by law, in two daily papers published in the English language, before their first meeting to execute said ordinance; and on the contrary only inserted said notice, in pretended compliance with the law, in the, a daily paper in the city of published in the English language, and in the, a daily newspaper of the city of published in the German language.

3. Because the preliminary notice published in supposed compliance with section of the city charter in the and in the, stated that the commissioners for opening streets would meet on, .. A. M., to execute the powers given to them in opening street. The said commissioners certify in the proceedings that in accordance with the said notice they met on, 19.., at .. A. M., a different time from that stated in the notice, and therefore not in compliance with said notice.

.....
Attorney for

Order

The motion to quash of the appellant in this cause coming on for hearing, the proceeding herein and the agreed statement

of facts were considered and counsel for the respective parties heard.

It is thereupon this day of, 19.., by the court ordered that the said motion to quash be and the same hereby is overruled.

2985 Demurrer, practice

A defect in a petition for condemnation may be taken advantage of by demurrer.⁶⁰

DEFENSES

2986 Corporate capacity

In condemnation it is not permissible to question the petitioner's incorporation.⁶¹ Thus, the legality of the organization of the drainage district cannot be questioned in a proceeding for a right of way for a ditch across private property.⁶²

2987 Corporate existence, proof

A petitioner is required to show its existence only as a *de facto* corporation by virtue of some valid law under which a corporation of its character could be created. A *bona fide* attempt at incorporation is all that is necessary. The urging of questions which would require the determination of the petitioner's existence as a corporation *de jure* are not permissible in a condemnation proceeding.⁶³

2988 Drainage act, validity

The invalidity of the provisions of the Illinois Drainage act relative to the method of ascertaining damages, does not affect the whole of said act.⁶⁴

2989 Forfeiture of franchise

A private person cannot prevent condemnation of his property on the ground that the petitioner has forfeited its fran-

⁶⁰ *Suver v. Chicago, Santa Fe & California Ry. Co.*, 123 Ill. 297.

⁶¹ *Eddleman v. Union County Traction & Power Co.*, 217 Ill. 414, 415.

⁶² *Smith v. Claussen Park Drainage District*, 229 Ill. 161; *Cleveland, Cincinnati, Chicago & St. Louis Ry.*

Co. v. Polecat District, 213 Ill. 83, 86 (1904). See next Section.

⁶³ *Chicago & Western Indiana R. Co. v. Heidenreich*, 254 Ill. 234, 236.

⁶⁴ *Smith v. Claussen Park Drainage District*, 229 Ill. 160.

chise, as the question of forfeiture can be determined only in a direct proceeding instituted by the state.⁶⁵

2990 Illegal contract or combination

The existence of a contract in restraint of trade between petitioner and another railroad company cannot be urged in a proceeding to condemn the property.⁶⁶

2991 Necessity of condemnation, practice

In the absence of a clear abuse of the exercise of the right of eminent domain a court has no power to deny condemnation upon the ground that the right to condemn is unnecessary or inexpedient, as the determination of that question is legislative and not judicial.⁶⁷

An issue upon the right of and the necessity for the taking of land for eminent domain purposes should be made up by a traverse of the petition, which must be presented to the court as a preliminary question.⁶⁸

2992 Ownership, pleading

If the original petitioner desires to contest the allegation of ownership by the cross-petitioner, he must, by appropriate pleading, raise that issue.⁶⁹

2993 Plans and specifications, sufficiency

In a proceeding for the condemnation of land for drainage purposes, plans and specifications are sufficient which furnish information of width, depth, course, the quantity of dirt to be removed, where placed, and the height of the embankments.⁷⁰

2994 Power to condemn, limitation, practice

A limitation upon a petitioner's power of eminent domain will be enforced.⁷¹ An objection that the petitioner is seeking to

⁶⁵ *Thomas v. South Side Elevated R. Co.*, 218 Ill. 571, 572 (1905).

⁶⁶ *Terre Haute & Peoria R. Co. v. Robbins*, 247 Ill. 376, 380 (1910).

⁶⁷ *Terre Haute & Peoria R. Co. v. Robbins*, 247 Ill. 381; *Pittsburgh, Ft. W. & C. Ry. Co. v. Sanitary District*, 218 Ill. 290; *Paris v. Cairo, V. & C. Ry. Co.*, 248 Ill. 213, 218, 219 (1911); *South Park Commissioners v. Montgomery Ward & Co.*, *supra*;

Mercer County v. Wolff, 237 Ill. 79, 81.

⁶⁸ *Smith v. Claussen Park Drainage District*, 229 Ill. 155.

⁶⁹ *Chicago & Milwaukee Electric R. Co. v. Diver*, 213 Ill. 31.

⁷⁰ *Smith v. Claussen Park Drainage District*, 229 Ill. 164.

⁷¹ *Peabody Coal Co. v. Northwestern Elevated R. Co.*, 230 Ill. 214, 220 (1907).

appropriate more land than is necessary must be made to and determined by the court alone before just compensation is assessed by the jury, and without the intervention of witnesses; the objection is waived if it is not made at the proper time.⁷²

2995 Public easement outstanding

The existence of an unacquired public easement is no defense to a condemnation of all of the rights in the fee.⁷³

2996 Title, practice

Some sort of objection or traverse is necessary to justify a decision by the court as to title, although the statute contemplates only a petition and cross-petition in a condemnation proceeding.⁷⁴ The proper practice, in Illinois, is to submit and to determine questions of title, if any, before the submission of the question of damages to the jury; but the failure to present questions of title at the proper time is an irregularity which may be waived, and these questions may be decided when ordering compensation to be paid to the respective parties.⁷⁵

Upon the determination of a tax-title adversely to its claimant, no provision for reimbursement for expenditures, interest, etc., of the tax-buyer is necessary, as he has no such right under the statute or on equitable grounds in a condemnation proceeding.⁷⁶

2997 Title, proof

Since the Illinois act of 1852 which authorizes condemnation by railroads, the defendants are not bound to prove their title to the premises that are sought to be condemned.⁷⁷ The filing of a petition to condemn property is an admission of a defendant's title;⁷⁸ and the averments regarding a defendant's title

⁷² Bell v. Mattoon Water-Works & Reservoir Co., 245 Ill. 547; Smith v. Claussen Park Drainage District, 229 Ill. 164.

⁷³ Chicago & Western Indiana R. Co. v. Heidenreich, 254 Ill. 237.

⁷⁴ Sanitary District v. Pittsburgh, Ft. W. & C. Ry. Co., 216 Ill. 579.

⁷⁵ Metropolitan West Side Elevated Ry. Co. v. Eschner, 232 Ill. 214; Chicago v. Pick, 251 Ill. 594,

597 (1911); Chicago & Northwestern Ry. Co. v. Miller, 251 Ill. 63.

⁷⁶ Chicago v. Pick, 251 Ill. 599; Sec. 224, Revenue law (Hurd's Stat. 1908, p. 1788).

⁷⁷ St. Louis & Southeastern Ry. Co. v. Teters, 68 Ill. 144, 148 (1873); Metropolitan West Side Elevated Ry. Co. v. Eschner, 232 Ill. 213.

⁷⁸ Chicago & Iowa R. Co. v. Hopkins, 90 Ill. 316, 322 (1878).

in the petition are binding upon the petitioner, but not on the defendant.⁷⁹

ANSWER

2998 Practice

The condemnation of property is regulated by statute and is summary. In Illinois, this proceeding is not governed, either as to pleadings or as to practice, by the rules of the common law.⁸⁰ No other pleadings are permissible than the petition, or cross-petition, which raises an issue of fact triable by jury. It is not necessary, therefore, that a petition or cross-petition shall be answered, jurisdiction of the subject matter being fully acquired from the petition and cross-petition. If an answer is filed the same may be stricken from the files.⁸¹ But the defendant, before empaneling a jury to determine the compensation, may traverse the jurisdictional allegations in the petition by motion to dismiss supported by affidavits; which motion is to be determined summarily by the court.⁸²

2999 Answer (D. C.)

(Caption)

Now comes, one of the defendants in the above entitled cause, and says that he is the owner in fee simple of parts of lots numbered and in square numbered described in the petition, and is willing that the same may be taken by condemnation for the purpose set out in the said petition provided he is paid a reasonable compensation therefor.

Further, that, one of the defendants, conveyed all his interest to one in said real estate and that your defendant purchased the same at a trustees' sale under a trust made by the said, so that any interest which the said may have had as set forth in equity No. . . . is now vested in this defendant.

.
, Attorney.

(Verification)

⁷⁹ Metropolitan West Side Elevated Ry. Co. v. Eschner, *supra*.

⁸⁰ Sanitary District v. Chapin, 226 Ill. 499, 502 (1907); Sweeney v. Chicago Telephone Co., 212 Ill. 476; O'Hare v. Chicago, Madison & Northern R. Co., 139 Ill. 151, (1891).

⁸¹ Chicago & Iowa R. Co. v. Hopkins, 90 Ill. 319; Chicago & North-

western Ry. Co. v. Glos, 239 Ill. 24, 25 (1909); Smith v. Chicago & Western Indiana R. Co., 105 Ill. 511, 520 (1883).

⁸² O'Hare v. Chicago, Madison & Northern R. Co., 139 Ill. 158; Metropolitan West Side Elevated R. Co. v. Siegel, 161 Ill. 638, 643 (1896).

3000 Disclaimer (D. C.)

(Caption)

Now comes, one of the defendants in the above entitled cause, and disclaims having any interest in the subject matter of this suit because he says that several years ago he conveyed his interest in the parts of lots numbered and square, set out in the petition, to and the said interest is now vested in one of the defendants hereto and the other part of the said lots is vested in the United States under condemnation proceedings in equity No. and in which cause he received compensation therefor.

.
, Attorney.

(Verification)

3001. Traverse and motion (Ill.)

(Caption)

Now comes said defendant by, its attorney, and admits that it is the owner in fee simple of the property described in said petition, but it denies that petitioner is authorized and empowered to construct and operate a line of railroad in any part of said county. It denies that petitioner has any right to construct sidings, side-tracks and appurtenances and other street railroad facilities and acquire necessary waylands therefor. Defendant denies that it will be necessary for petitioner to take and appropriate for waylands or any other railroad purpose, any of the realty of this defendant. It denies that petitioner has made any effort to agree with defendant for compensation for taking said property. And it denies that it is necessary for petitioner to institute this proceeding.

2. That said petitioner does not state or plead any fact or facts showing the legal necessity under the law for petitioner to abandon the public ways and condemn private property for street railway purposes.

3. The petition does not show whether said private property is desired for side-tracks or station grounds.

4. That petitioner has no legal power or right to condemn private property for a railroad track.

5. Petitioner has not adopted by law any route through any part of the village of

6. Petitioner is not a commercial railroad corporation under the law for the purpose of constructing railways, maintaining and operating the same, for prescribing and defining the duties and limiting the powers of such corporations as may be organized under the act of March 1, 1872, and acts amendatory thereto, nor for the purpose of constructing, maintaining and operating an interurban railway between the city of and the city of

7. The petition shows no right under the law to exercise the franchise of eminent domain. Said petitioner is not organized as a corporation for the construction of steam railroads, inter-urban railroads, street railroads or any other kind of a railroad.

Said defendant further alleges that it does not consent to this proceeding to condemn said right of way. All of which said issues of law and of fact are hereby presented to this court as a defense against proceeding further, and defendant prays for a hearing thereon and that upon such hearing said petition may be dismissed at the cost of the petitioner.

.....
By
its attorney.

Order

(Caption)

And now comes the petitioner, the, by, its attorneys, and also comes the respondent, the, a corporation, by, its attorney, and said respondent by its said attorney files herein its traverse of and motion to dismiss the petition of the said And the court having examined the same and heard the evidence upon the issues, in open court, and being duly advised therein doth order that said traverse and motion to dismiss be and the same is hereby overruled. To which ruling said defendant by its said attorney excepts.

CROSS-PETITION

3002 Necessity

A defendant who has a special interest in the premises which are sought to be condemned has a right to present that interest by cross-petition and proof in the condemnation proceeding.⁸³ An owner who claims damages to land which is contiguous to that which is described in the petition, must file a cross-petition.⁸⁴ An abutting owner whose property is not physically taken for purposes of condemnation cannot claim damages to his property by way of a cross-petition in a condemnation proceeding, but is remitted to an action at law for such damages.⁸⁵

⁸³ Chicago v. Walker, 251 Ill. 629, 634 (1911).

⁸⁴ Chicago & Iowa R. Co. v. Hopkins, 90 Ill. 318, 319.

⁸⁵ Mercer County v. Wolff, 237 Ill. 76, 77.

3003 Waiver

The filing of a cross-petition waives the right to move the dismissal of the petition on the ground that the petitioner is not a corporation, but does not waive the right to move for a dismissal if based upon any act of the petitioner which was not disclosed by the record at the time of the filing of the cross-petition.⁸⁶

3004 Requisites

A cross-petition should describe the land not taken with certainty and should expressly aver the damages to such land.⁸⁷ If the cross-petition seeks an award of damages accruing to land not taken, it must allege that the petitioner is the owner of the property claimed to be damaged.⁸⁸

Any damages that would be sustained to the property which is not actually taken in a condemnation proceeding, is provable under a cross-petition, except damages that would be occasioned by the enforcement of police regulations.⁸⁹

3005 Cross-petitions (Ill.)

(Caption)

Now comes, one of the impleaded defendants in said entitled cause by, his attorneys and files his cross-petition herein and alleges that he, the said is the owner in fee simple of the following described real estate, through which the said petitioner proposes to condemn a . . . foot strip of land for drainage and levee purposes, to wit: (Describe property) containing . . . acres more or less, all of which is one farm which has been and is being used by your cross-petitioner for agricultural and farming purposes.

Said cross-petitioner further shows that said petitioner proposes to condemn a strip of land feet in width running through and across said described property, by cutting a portion of the property at an acute angle, and so leaving it that your cross-petitioner will not be able to cross from one part to the other of his said property so cut across without putting up bridges; that the bridges must be from to feet in length; that it will be necessary for this cross-petitioner to erect a heavy and substantial stone pier at each end of the

⁸⁶ Peabody Coal Co. v. Northwestern Elevated R. Co., 230 Ill. 223.

⁸⁷ Drainage Commissioners v. Knox, 237 Ill. 153, 154.

⁸⁸ Chicago & Milwaukee Electric R. Co. v. Diver, 213 Ill. 31.

⁸⁹ Paris v. Cairo, V. & C. Ry. Co., 248 Ill. 222, 224.

bridges; and that it will be necessary to build two bridges that will cost approximately dollars each.

Your cross-petitioner further shows that said petitioner has taken in and added to the territory drained in the state of nature and which territory used natural drainage running through and across the part of your cross-petitioner's farm as aforesaid, a certain large and other section of territory that is not tributary thereto; that by taking the said added territory it has greatly enlarged the flow of water that is and will be flowing across the premises of your cross-petitioner; that by reason of such enlarged and unnatural drainage the premises of your cross-petitioner will be subject to overflow because of the additional water forced in, through and across the farm property of your cross-petitioner; and that your cross-petitioner at every heavy rainfall will be subject to heavy damages from such rainfall, change and diversion of the water from its natural course to the water-course now running through and across the premises of your cross-petitioner aforesaid.

That the construction and completion of said drainage ditch and levee by the petitioner as alleged, will greatly interfere with and hamper your cross-petitioner in properly conducting and working his said farm; that the construction of said drainage ditch and levee as contemplated will necessitate a large amount of inconvenience and expense to your cross-petitioner in farming his land hereinbefore described; and that by reason of the construction and completion of said drainage ditch and levee and of the inconvenience and expense to which your cross-petitioner will be subjected, as aforesaid, all of the said described premises of your cross-petitioner will be damaged and greatly depreciated in market value, to wit, to the extent of dollars.

.....
Attorneys for defendants.

b

(Caption)

Now comes the said by, its attorney, and files its cross-petition herein and alleges that the said is the owner in fee of the following described real estate, through which the said petitioner proposes to condemn a foot strip, to wit: (Describe property), all of which constitute one indivisible tract, which has been used for many years and is still being used by your cross-petitioner for the carrying on, manufacturing and selling of; that upon said tract are now located between and buildings used and operated by your cross-petitioner in its said business; that one of said buildings is feet long, feet wide and stories high; that another of said buildings is feet long, feet wide and stories

high, and that the aggregate ground floor space of all of said buildings is square feet; that said tract of land and buildings are adjoining the tracks of the, and upon said tract of land are various railroad switches from said into said tract, and communicating with said factory buildings.

Said cross-petitioner further shows that said petitioner proposes to condemn a strip of land feet wide, the line of which said strip will be within about feet of the east line of of said factory buildings; that for the proper conduct of said business, it will be necessary for your cross-petitioner to construct another side-track and switch from said along the east side of said factory buildings, and it will also be necessary and your cross-petitioner has had in contemplation for some time the erection of other factory buildings east of those now constructed and upon that part of said tract where said petitioner proposes to lay its said railroad track; that the buildings of said cross-petitioner are now crowded to their utmost capacity and other buildings as aforesaid are in contemplation, and that the construction and operation of said railroad by petitioner as alleged and as laid out, will greatly interfere and hamper your cross-petitioner in the proper conduct of its said business and deprive it of the proper uses of said tract; that the construction of said railroad as contemplated will necessitate on the part of your cross-petitioner a re-arrangement of its method of conducting its business and would prevent it from constructing a side-track on the east side of said factory buildings above mentioned, and will interfere with the ingress and egress from the buildings now erected to that part of said tract lying east of the said proposed railroad; that the part of said tract lying east of the said proposed railroad has been used for many years by your cross-petitioner in experimenting and testing the articles of its manufacture which consists entirely of; that the operation of said contemplated road will increase the rates of insurance upon all of said buildings and will depreciate the market value of all of said property to a great extent by interfering with the proper operation of the same, and creating noise, dust and cinders in close proximity to said factory buildings and offices, jarring the same and making it more hazardous for the operatives of said factories going to and from the part of the tract lying east of the said proposed railroad; that the dangers from fire by reason of the operation of said railroad will greatly depreciate the market value of said property; that by reason of the premises all of said property of your cross-petitioner will be greatly depreciated in value to the extent, to wit, of dollars, by the construction and operation of said contemplated road.

c

(Caption)

And the said comes and says that he is the owner of the lands mentioned in the petition, and other land contiguous thereto, making a farm of acres in a compact body; that said railroad company takes about acres out of his farm, dividing wood, water and timber from the balance of the said farm; that the land thus taken is of the value of dollars per acre, and the damage by reason of cutting the farm is dollars; and he respectfully asks that his compensation and damages may be awarded to him as shall be just and proper.⁹⁰

PRACTICE

3006 Amendment

Amendments to the petition, or to any paper of record in the cause may be permitted under the Eminent Domain act of Illinois whenever necessary to a fair trial and final determination of the questions involved.⁹¹ A petition may be amended after verdict with reference to the description of the premises if no material rights of parties are thereby affected.⁹²

3007 Preliminary questions, determination of, order (D. C.)

(Caption)

Upon consideration of the petition in this cause, it is this day of,, ordered that this cause be and the same is hereby referred to the auditor with directions to examine into the titles to the several parcels condemned and taken, and to report to the court the names of the parties who are entitled to receive payment therefor; such proceedings to be at the cost of the government.

Justice.

(Illinois)

(Caption)

Now comes the, district of county, Illinois, petitioner, by, its attorneys. (Insert other appearances if any)

⁹⁰ The foregoing cross-petition was considered sufficient in the absence of an application by the petitioner for an order to require the respondent to make the cross-petition more specific. *Chicago & Iowa R. Co. v. Hopkins*, 90 Ill. 319, 320.

⁹¹ *Martin v. Chicago & Milwaukee Electric R. Co.*, 220 Ill. 97, 100 (1906).

⁹² *Eddleman v. Union County Traction & Power Co.*, 217 Ill. 422.

And the defendants came not and herein made default; and this cause coming on to be heard, and the court having heard oral evidence in open court, and being fully advised in the premises, and having heard the arguments of counsel, doth find that the petitioner, the, district of county, Illinois, is a corporation, duly organized as a drainage district, under an act entitled, "An act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts," approved and in force May 29, 1879, and all the amendatory acts thereto; that it has in due form by law located a system of drains and ditches upon and across the lands as shown in the petition herein; and that said drains and ditches are necessary for the proper drainage of the lands within said drainage district.

That, and are the commissioners in and for the said drainage district, petitioner.

That is the owner of a strip of land described, as follows:

A certain strip of land feet in width. (Insert description)

(Repeat the last two paragraphs for each owner and parcel of land)

The court doth further find that the said petitioner has been unable to agree with the respective owners or any or either of them of said respective strips and parcels of ground as to compensation for the same.

The court doth further find that the said parcels and strips of ground, as hereinbefore described, and each and all of them are necessary to the system of drainage as established and laid out by the petitioner, and that it is necessary for the said petitioner for the purposes of its organization to have the control and ownership of the same.

The court doth further find that it has jurisdiction of the persons of the defendants and of the subject matter herein, and that due and sufficient proof has been made of all jurisdictional facts and of all facts necessary to be proven preliminary to the submission of the question of damages to the jury; and defendants move to dismiss petition herein, which said motion is overruled and denied by the court, to which said ruling defendants object and except.

It is therefore, considered and ordered by the court that a jury be empaneled herein, to determine and ascertain the compensation for land sought to be taken as described in the petition herein and damages for land of the defendants not taken as the same may be claimed by the defendants herein.

.....

Judge.

3008. Stipulation for reduction of damages, validity

The petitioner may stipulate for the performance of acts which would have the effect of reducing the amount of damages claimed.⁹³ Thus, in a condemnation proceeding to acquire property for right of way purposes, the petitioner may stipulate as to the manner in which the land shall be used, or that the petitioner will perform certain things connected with or upon the land which will tend to lessen the damages to the land owner, but which will not seriously impair the safety of the operation of the railroad to the traveling public.⁹⁴

3009. Stipulation regarding embankments

(Caption)

The district hereby stipulates and agrees as to the defendant that it will at any one point opposite and in the land of the said defendant remove all levees and artificial embankments by it created in the construction of its proposed drainage ditch, and will permit the banks of its said ditch at said point, which is to be any point indicated by said defendant, to be scraped down to a gradual slope, not lower at the end next to the ditch than the bottom of the ditch, and thence sloping backward from said ditch for a distance of not to exceed feet, in such manner and of such size as to permit cattle to have access to the waters flowing within said proposed drainage ditch.

It is further stipulated and agreed that the defendant herein will be permitted to erect and construct such bridges and approaches across said proposed ditches as the defendant may see fit to construct, in such manner as will not interfere with the flow of water in the ditches and drains as constructed, and the defendant will be allowed access to the lands sought to be condemned for the purpose of constructing such bridges and approaches for the purposes of passage over and across the same.

.....

As commissioners of the district.

COMMISSIONERS

3010. Appointment, motion (W. Va.)

(Caption)

This day came by its attorneys the petitioner, the company, a corporation whose petition in this proceeding and a

⁹³ Smith v. Claussen Park Drainage District, 229 Ill. 166.

⁹⁴ Eldorado, Marion & S. W. R. Co. v. Sims, 228 Ill. 9, 16 (1907).

map of the lands sought to be condemned herein were filed in the clerk's office of this court on the day of, 19.., and tendered copies of its notice to the defendants of the application this day made by it in this proceeding with evidence of the service thereof upon the defendant, the county court of county, and evidence of publication and posting thereof as to all the other defendants above named as required by section 6 of chapter 42 of the Code of West Virginia, to wit: by the publication thereof once a week for four successive weeks preceding this day in the, a newspaper published in county, the first publication being on the day of, 19.., and the posting of a copy thereof at the front door of the court house of said county on said day of, 19.., which copies of said notice with evidence of the service by publication and posting thereof as aforesaid are ordered to be filed; and the and said petitioner moves the court to appoint commissioners as and for the purpose in said petition and notice prayed and mentioned, which motion and this proceeding and petitioner's written application or petition are ordered to be docketed.

3011. Appointment, order (D. C.)

(Caption)

Upon further consideration of the original petition filed herein, as amended, by, United States attorney for the District of Columbia, and upon consideration of the several answers to said petition and all other papers and proceedings in this cause, it is, this day of, 19.., ordered that, and be, and they are hereby appointed commissioners to appraise the value of the respective interests of all persons concerned in the several parcels of real estate embraced in squares and, in the city of, District of Columbia.

And it is further ordered that the marshal forthwith serve a copy of this order upon each of the above named persons, each of whom shall take and subscribe an oath or affirmation before the clerk of the court, to be filed in the cause, that he is not related in any way to the parties who are interested in the land proposed to be condemned in this proceeding; that he has no interest whatever in the same; that he will faithfully, justly, and impartially appraise and assess the value or values of the several parcels of real estate involved in this proceeding, and of the respective interests therein, to the best of his judgment, skill, and ability; and that he will return such appraisement and assessment forthwith to this court.

By the court,

.....

Justice.

Return

Served copy of the within order on and
personally (date).

.....
Marshal.

(Virginia)

(Caption)

This day came the railway company, by its attorney, and also came the said company, by its attorney, and it appearing to the satisfaction of the court that the railway company did, on the day of, 19.., file in the clerk's office of this court, as required by statute, a petition for the appointment of commissioners, together with a plat of the survey with a profile showing the cuts and fills, trestles and bridges, if any, and a description of the land sought to be condemned in these proceedings, together with a memorandum showing the residence or principal office of the defendant, the company, the owner of the interest in the land sought to be acquired in these premises, so far as the petitioner is advised; and it further appearing to the court from a certificate of, the editor of the, that notice of the application for the appointment of commissioners was published once a week for two successive weeks in the, a paper published in the city of, pursuant to order of this court, on the day of, 19.., there being no newspaper published in the county of; and it further appearing to the satisfaction of this court that said company, the tenant of the freehold, has been personally served with notice, and that said notice was posted at the front door of the court house of county, ten days prior to the application;

Thereupon, in accordance with the prayer of the aforesaid petition, the court doth appoint,,,, and, five disinterested freeholders of the county of, any three of whom may act, for the purpose of ascertaining what will be a just compensation to the said defendant for the fee simple interest in so much of the said land of the freehold whereof the said company is a tenant, proposed to be condemned for the use of the plaintiff, and to award the damages, if any, resulting to the property of the owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the works of the said petitioner.

And the court doth order that the said commissioners, or any three or more of them, shall assemble on the premises of the said

defendant described in said petition and notice, on the .. day of, 19.., at the hour of .. o'clock, and having been first duly sworn according to law, and after having viewed the said land and hearing such proper evidence as either party shall offer, shall ascertain what will be a just compensation for the fee simple interest in so much of the said land as will be required for the purposes of the said railway company, and damages, if any, resulting to the adjacent or other property of the said company, or to the property of any other person beyond the peculiar benefits that will accrue to said properties, respectively, from the construction and operation of said company's works, and report their proceedings to the court according to law.

(West Virginia)

(Caption)

This day came the county court of said county and filed in open court, its application in writing by petition, with a plat of the land proposed to be taken, describing certain lands in district in said county it proposes to take for the establishment of an alteration in the public road in said district, stating the names of the owners thereof, the nature of the interest of said parties in said land, the purpose for which said land is proposed to be taken, that the said county court has been unable to agree with the owners as to the compensation to be paid therefor, and praying for the appointment of commissioners to ascertain a just compensation to the said and the joint owners of the land in fee for so much of the said land as is proposed by said applicant to be taken for the purpose as aforesaid as well as damages to the residue of said land beyond the peculiar benefits which will be derived in respect to such residue from the work to be constructed; and it appearing to the court that legal notice has been given by the said county court by legal service thereof on the said and by publication of said notice as to for four successive weeks in the, a newspaper printed and published in said county, which notice of the intention of said county court to file said petition and of this motion as to was duly published and posted as is required by law; and it further appearing to the court that said is now and has been sometime a nonresident of this state, and that this case is one in which the applicant, the county court, has a lawful right to take said property described in said petition and notice for the purposes set out in said petition, and that said land so proposed to be taken is necessary for the purposes aforesaid, and will be used for said purposes;

Thereupon, the court doth nominate thirteen disinterested freeholders of said county as follows, viz.: (Name

them); and said not appearing, and and the said county court appearing by counsel proceeded to ascertain as provided by law from said thirteen freeholders the five thereof to act as commissioners; which lot and choice fell upon the following named five freeholders: (Name them).

And thereupon it is ordered by the court that the said five freeholders so selected to act as such commissioners do proceed with convenient speed, and after viewing said premises and hearing any proper evidence offered, ascertain according to law what will be a just compensation to the said and as herein before provided and make report of their proceedings to this court according to law.

The said, by her counsel excepted to the manner of selecting the said five commissioners because said thirteen freeholders from whose number said commissioners were selected were not summoned to attend and did not appear in court before the defendant,, was required to strike from said list of thirteen freeholders the four which the law entitles her to strike.

Memorandum, etc.

3012 Commissioners' oath (Va.)

(Venue)

I,, a notary public in and for the county aforesaid, state of Virginia, do certify that have this day personally appeared before me in my said county, and made oath before me that they will faithfully and impartially ascertain what will be a just compensation for such interest in the land of freehold whereof is tenant and of such property as is proposed to be taken by the for its purposes, and award the damages, if any, resulting to the adjacent and other property of said tenant or owner, and to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, by the construction and operation of the company's works, and will truly certify the same.

Given under my hand this day, etc.

(West Virginia)

(Venue)

This day personally appeared before me the undersigned authority in and for the county and state aforesaid, and and took upon themselves the following oath: Do you and each of you solemnly swear that you will honestly and impartially perform your duties as commissioners in the assessment for and damages to the real estate owned by and and proposed to be taken by the county court of county, West Virginia, and used for a public road

in district in said county, to the best of your skill and judgment, so help you God.

Given under my hand this day of, 19...

.....
Notary Public.

3013 Stenographer, designation (D. C.)

(Caption)

Upon this matter coming on before the court for hearing, it is hereby ordered that, be and he is hereby designated as stenographer in the above entitled cause, to be paid in accordance with the terms of his contract with the department of justice, and that the said shall serve as clerk to the commission in said cause, without additional compensation.

By the court,

.....
Justice.

3014 Report or appraisement (D. C.)

(Caption)

We, the undersigned commissioners appointed by the order of the court heretofore passed in the above entitled cause to appraise the respective interests of all persons concerned in the lands embraced in said squares and to return an appraisement thereof to the court, respectfully submit to the court the following report of our proceedings and action in the premises, namely:

We first took and then subscribed respectively the oath provided in said order, and after due notice to the parties in interest, we met at the court house building on, 19..., as we were instructed by the court, and organized.

Subsequently, and before the taking of any testimony, we viewed the premises, and after due notice to the parties in interest, we met at the court house building aforesaid, at the hour of .. o'clock noon,, and continued to meet thereafter at the same place upon days and hours certain by adjournments, to and including the day of,, for the purpose of hearing such parties in interest as demanded to be heard touching the values of their respective interests; and having at such meetings heard such parties and the evidence adduced in their behalf touching the values of their respective interests; and having also heard the evidence adduced on behalf of the petitioner touching such values; and having given all parties in interest an opportunity to be heard in argument by counsel for sundry of said parties, including the petitioner; and having duly considered the matter in executive sessions, we do now this day of, 19., upon our respective oaths, appraise

the values of the respective interests of all persons concerned in the parcels of land and premises in said squares and, as set forth in the schedule herein below given.

We file herewith a plat of said squares, which is made a part hereof, and upon which plat are shown and delineated the several parcels of land in said squares, which are referred to in said schedule.

Schedule :

Parcel No. 1. We appraise the value of the said interest of the owner of the fee simple of the premises included in this parcel, square feet at\$

(Proceed with each parcel in the same manner)

The report of the testimony before the commission is herewith filed.

The foregoing award is respectfully submitted.

.....
.....

Commissioners.

(Virginia)

(Caption)

We,, and, three of the commissioners appointed by the circuit court of county, state of Virginia, to ascertain what will be a just compensation for the fee simple interest in a portion of the roadway of the company, proposed to be taken by the railway company, and to assess the damages, if any, resulting to the adjacent or other property owned by said company, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's works, do certify that on the day of, 19.., the day designated in the said order, we met together on the said part of the roadway, which was then and there described to us as follows:

Beginning at a point (Insert legal description) and containing acres, more or less.

And after being duly sworn, upon a view of the part aforesaid, and of the adjacent and other property of said owner, and of the property of other persons, who will be damaged in their property by the construction and operation of the works of said company; and upon such evidence as was before us, we are of opinion and do ascertain that for the said part, and for the other property so taken dollars (\$.) will be a just compensation; and the damages to the adjacent and other property of said owner, and to the property of other persons, who will be damaged in their property by reason of the construction and operation of the works of said company, be-

yond the peculiar benefits that will accrue to such property, respectively, from the construction and operation of such works, are:

To the adjacent and other property of the company, dollars (\$.....), and to the property of other persons, no dollars.

Given under our hands this the day of, 19...
(Signatures and seal)⁹⁵

(West Virginia)

(Caption)

We, the commissioners, appointed by the circuit court of county, by an order made on the day of, 19.., on the application of the county court of county, West Virginia, respectfully report, that having been first duly sworn we have viewed the real estate owned by and, mentioned in said application, and are of opinion that dollars will be a just compensation for so much of the said real estate as is proposed to be taken by the said applicant, that is to say: (Insert same description of land as is contained in the application or petition), as well as for damages to the residue of the said real estate beyond the peculiar benefits which will be derived in respect to such residue from the purposes to which the part to be taken by said applicant is to be appropriated. The plat of said land, marked ".....," is filed with the application in writing in this case, and shows the center line of the public road proposed to be established in said land.

Given under our hands this day of, 19...

(Five signatures)

Commissioners.

3015 Exceptions (Va.)

(Caption)

To the honorable, etc.

The undersigned excepts to the report of the commissioners dated the day of, and filed the day of on the following grounds:

1. Because under the present constitution of this state the compensation allowed and the damages awarded should have been made by a jury and not by a set of commissioners.

2. Because the compensation allowed is grossly inadequate and insufficient, the commissioners having failed to consider proper evidence in regard to the same.

3. Because insufficient damages were allowed.

⁹⁵ Attach commissioners' oath.

4. Because improper evidence was allowed in this, to wit:

a. That the commissioners allowed evidence as to the benefits to be considered in reduction to the damages, which were not confined to such as are direct and peculiar to the owner of the land, excluding those which he shares with other members of the community whose property is not taken.

b. That the materials purchased were such as are used by ordinary electric roads and that no provision was made for the road to be operated by steam or other motive power, and hence it was improper to consider any evidence in regard to the operation and construction of the road for steam or any other power.

5. Because proper evidence was ignored and not considered in respect to damages which would be sustained in the event said road should be constructed and operated as a steam road.

6. Because counsel for petitioner denied and as a consequence the commissioners failed to consider that the court had verbally instructed that damages should be awarded for injury resulting from the use of the most destructive motive power.

7. Because the evidence was insufficient to sustain the finding of the commissioners in any event.

Respectfully,

.....
By counsel.

.....
p. d.

3016 Order affirming (D. C.)

(Caption)

Upon motion of the attorney for the United States, and it appearing that no exceptions or objections have been filed to the report of the commissioners filed herein, it is this day of, 19.., ordered and adjudged that the said report and the findings thereof be and the same are in all things confirmed.

By the court,

.....
Justice.

(Virginia)

(Caption)

This day came again the railroad company, by its attorney, and came also the company, by its attorney, and the said railway company moved the court to confirm the report of commissioners,, and.....,

which said report was filed on the .. day of, 19... And there being no good cause shown against said report, the court doth confirm the same.

And it appearing from certificate of deposit of the bank of, filed in the papers in this cause, that said railway company on the day of, 19..., pursuant to the order of this court did enter and deposit in said bank, to the credit of the court in this cause the sum of dollars, the court doth appoint to ascertain what persons are entitled to said sum so deposited, and in what proportions, and report to this court.

(West Virginia)

(Caption)

This day came the parties by their attorneys, and thereupon the contestants, the said and, moved the court to quash the application filed herein, by the said county court of county, West Virginia, which being argued by counsel and considered by the court is overruled.

And thereupon the said contestants by their said attorney moved the court to dismiss this proceeding, which motion being argued by counsel and considered by the court is overruled.

And it appearing to the court that the matter of the establishment of a public road in and districts in said county had been proceeded with in the county court of this county and that the prosecuting attorney of said county had been required by said county court to institute and prosecute proceedings in said court to condemn a right of way for a public road, which the said county court had undertaken to establish in said district, through the lands of the said and; and it further appearing to the court that the papers in said proceeding in the county court together with the orders made by the county court in relation thereto had been certified to this court, before the appointment of the commissioners to assess the damages to the said and and that said papers had been filed with the clerk of this court in this proceeding; and it further appearing to the court that the commissioners heretofore appointed to ascertain the compensation to which the said and, are entitled for the land sought to be taken from them in this proceeding, filed their report in the clerk's office of this court on the .. day of, 19..., fixing the compensation to the said and for the land taken, as well as damages to the residue beyond the peculiar benefits to be derived to said residue for the public road to be constructed, at the sum of dollars; and there being no exceptions to said report and neither party demanding a trial by jury, the said report of the said commissioners is hereby confirmed by

the court; and it is ordered by the court that the said report be recorded in the law order book of this court, and the applicant, the said county court being willing to pay the said sum into court, in order to take immediate possession of the land, it is ordered that the said county court be allowed to make such payment, and thereupon the said county court here paid the said sum of dollars, it being the amount named in the said commissioners' report including interest thereon to this day; and it is further ordered that, general receiver of this court, receive said amount and deliver to the county court a proper receipt therefor in case the said and refuse to receive the same.

To the entering of the foregoing order the contestants and, appeared by their attorney, and objected and excepted. Memorandum, etc.

3017 Fees, payment; order (D. C.)

(Caption)

The commissioners hereto appointed in this proceeding, having returned their appraisement, and upon consideration of the proceedings therein, it is by the court this day of, 19.., ordered that each of said commissioners,, and, be paid by the United States the sum of dollars for their services.

By the court,

.....

Justice.

INQUISITION

3018. Warrant (Md.)

To, Esquire,

Sheriff of county.

Sir: In pursuance of the foregoing application and the provisions of the acts of assembly therein referred to, you are hereby required to summon a jury of twenty inhabitants of the said county of, above the age of twenty-one years, and qualified to act as jurors under the laws of this state not related nor in anywise interested, to meet on the land described in the application and the plat thereto annexed, on the day of, 19.., at .. o'clock .. M. And if at said time and place any of said jurors summoned do not attend, you shall immediately summon as many jurors as may be necessary with the jurors in attendance to furnish a panel of twenty jurors in attendance and from them the said company as one party and the said as the other party, or their respective agents, may each strike off four jurors; and if either of the said parties be not present either in person

or by agent, you for the party or parties so absent, shall strike off four jurors, and the remaining twelve shall act as the jury of inquest of damages; and before they act as such you shall administer to each of them an oath or affirmation, as the case may be, that, in the presence of Almighty God, he "will justly and impartially value the damages which the said owner will sustain by the use or occupation of the land, so as aforesaid required by the said company." And you will see that the said jury reduce the inquisition to writing and sign and seal the same; and thereupon you shall return it to the clerk of the circuit court for county; and this shall be your warrant therefor.

Witness my hand and seal this day of, 19..

..... (Seal)

Justice of the Peace.

3019 Inquisition by court (Md.)

(Caption)

Inquisition, made and taken at bar in court, in the matter of the appeal of from the decision of the commissioners for opening streets, in the city of, as to the opening of street from street to the road.

Witnesseth, that this case having been submitted to the court without the intervention of a jury, and by agreement of counsel having heard the evidence and duly considered the same, I do find and determine the benefit as follows, to wit:

For benefits assessed against all the lot of ground on the north side of street and designated by the No. on plat A and B of the commissioners for opening streets, filed with the return of the said commissioners in the matter of opening street aforesaid, to be the sum of dollars (\$.....).

In testimony whereof, I,, associate judge of, have hereunto set my hand and affixed my seal this day of, 19..

..... (Seal)

3020 Inquisition by jury (Md.)

State of Maryland, }
..... county. } ss.

This inquisition, taken this day of, 19.., on the application of the company to, a justice of the peace of the state of Maryland, in and for county, to value the land of of county, Maryland, the owner thereof, required by the said company for the construction or repair of its branch railroad or any of its works, and necessary for the same

under the provisions of the acts of the general assembly of Maryland incorporating the said company, being the act of, chapter, together with the supplements and amendments thereto, and including the act of, chapter, relating to said branch railroad and the supplements and amendments thereto.

Witnesseth, that we, the jurors whose names are hereto subscribed and seals affixed, being duly empaneled, sworn, and charged justly and impartially to value the damages which said of, county, Maryland, the owner of the land hereinafter described will sustain by the use or occupation of all that lot or parcel of ground which is described as follows: (Insert legal description) containing acres, more or less, which parcel of ground is more particularly shown by the plat accompanying the foregoing application for the warrant in these proceedings, and filed herewith, being a part of the land described in a deed from *et ux.*, to said of county, Maryland, dated the day of, 19.., and recorded among the land records of county in liber folio; and in estimating said damage having taken into consideration the benefits resulting to said owner from conducting the said branch railroad through the property of said owner, but only in extinguishment of the claim for damages, do find and assess the said damages at the sum of dollars for the use and occupation in perpetuity by the said company of said parcel of land for its branch railroad.

In witness whereof we have hereunto set our hands and seals the day and year above written.

(Twelve signatures)

3021 Return (Md.)

(Caption)

I,, sheriff of county, to whom the foregoing warrant of, esquire, a justice of the peace of the state of Maryland, in and for county, and order to serve notice, together with the notice to be served thereto annexed, of the railroad company, were directed and delivered in obedience to said warrant, and in compliance with said order do hereby certify and return as follows, that is to say:

In compliance with said order to serve notice—

(1) I delivered a copy of said notice to, of county, Maryland, on the day of, 19..; and in obedience to said warrant—

(2) I summoned a jury of twenty (20) inhabitants of said county, above the age of twenty-one years and qualified to act

as jurors under the laws of Maryland, not related, nor in any-wise interested, to meet on the land more particularly described in the foregoing application and blue print or plat thereto annexed, and also described in said notices served by me as aforesaid, on the day of, 19.., at o'clock A. M., being the place, day and time set forth in said notices; that all of said jurors attended, so as to furnish a panel of twenty (20) persons in attendance, and from said panel the company struck off four (4) jurors, and said owner named in said warrant struck off four (4) jurors, leaving: (Name them) to act as the jury of inquest of damages.

(3) Before they acted as such jury I duly administered to each the following oath: "In the presence of Almighty God you will justly and impartially value the damages which of county, Maryland, will sustain by the use or occupation of the land by the railroad company, its successors or assigns, more particularly described in the application therefor and on the blue print or plat thereto annexed and in the warrant therefor and in said notice to be served, filed in these proceedings and deemed by said company necessary, requisite and proper and wanted by it for carrying out its objects and purposes."

(4) And I hereby further certify that said jury did meet on the day and at the time and on the land set forth in said warrant and notice and said application, respectively, and were then and there by me adjourned to meet on said land at o'clock P. M., of said day; and after having been by me then and there duly sworn as aforesaid, adjourned by agreement of said railroad company and said owner, to meet forthwith at the council chamber of the mayor and city council at; and that in pursuance of said agreement the said jury met on the said day of, 19.., at said council chamber in said city from day to day thereafter and then and there considered all matters submitted to them under this proceeding, reduced their inquisition to writing and did sign and seal the same; and

(5) I herewith return their said inquisition to the clerk of the circuit court for county, in accordance with the provisions of the code of public general laws referred to in said warrant.

Witness my hand and seal this day of, 19..

Sheriff of county.

3022 Objections (Md.)

(Caption)

....., defendant in the above entitled cause, by its attorneys object to the confirmation of a certain inquisition returned to the circuit court for

county, Maryland, on the day of, 19.., by, sheriff of said county, purporting to have been taken on the said day of upon the oaths of certain persons therein named, before said sheriff, on a tract or parcel of land alleged and stated in and by said inquisition to be owned by the said of county, Maryland, and in support of said objections the following causes are assigned and relied upon, namely: (Set forth causes).

And for other good and sufficient reasons, which will be assigned at or before the hearing of the confirmation of said inquisition.

.....

 Attorneys for defendant.

3023 Order affirming (Md.)

(Caption)

Objections to the ratification of the inquisition of the jury in this case having been filed by the land owner, a day was set for hearing the same, and on said day evidence was heard and the same was argued by the counsel for the respective parties and duly considered by the court, it is this day of in the year 19.. by the circuit court for county, adjudged and ordered that said objections are hereby overruled and that said inquisition be and the same is hereby confirmed and that judgment be entered by the clerk against the railroad company for the amount of the damages mentioned in the inquisition, namely, the sum of dollars (\$.....) and costs of this proceeding in favor of the defendant.

3024 Petition for writ of error (Md.)

(Caption)

To the honorable judges of said court.

The petition of the of, county, Maryland, defendant named in the above entitled proceeding, respectfully shows to this honorable court:

That it is aggrieved by the order and judgment of the circuit court for county, rendered against it on the day of, 19.., in the above entitled proceeding, by which the inquisition and the verdict of the jury therein were ratified and confirmed, and it alleges that said judgment is erroneous for the following reasons: (State them).

Your petitioner therefore prays this honorable court that a writ of error may be granted them to send the record of said cause to the court of appeals of Maryland for review and correction of the alleged errors.

.....

 Attorneys for petitioner.

(Venue)

I hereby certify that on this .. day of, 19..., before me, the subscriber, a justice of the peace of the state of Maryland, in and for said county, personally appeared, of county, Maryland, and made oath in due form of law that the writ of error is not taken for delay.

....., J. P.

Order

Upon the foregoing petition and affidavit it is ordered this day of, 19..., by the circuit court for county, that the writ of error be granted as prayed and that the record be sent to the court of appeals as prayed in said petition.

.....

TRIAL

3025 Issue triable

The sole issue involved in condemnation proceedings is the amount of compensation to be paid to the owner of the property to be condemned. If there are persons claiming adverse interests in the premises, the proper practice is to require them to litigate and to settle these claims prior to empaneling a jury.⁹⁶

3026 Jury right, practice

In condemnation proceedings a trial by jury is a matter of right.⁹⁷ The granting or the refusing of a motion for a separate trial is discretionary with the court.⁹⁸ A motion for a separate jury trial should present reasons in support of the motion.⁹⁹

3027 Jury, order for (D. C.)

(Caption)

Upon consideration of the petition of the commissioners of the District of Columbia, filed herein, and it appearing to the court that the notice heretofore ordered herein has been duly

⁹⁶ Chicago & Northwestern Ry. Co. v. Chicago Mechanics' Institute, 239 Ill. 216, 217; Metropolitan West Side Elevated Ry. Co. v. Eschner, 232 Ill. 212.

⁹⁷ Chicago & Northwestern Ry. Co. v. Miller, 251 Ill. 66.

⁹⁸ Eddleman v. Union County Traction & Power Co., 217 Ill. 413, 414.

⁹⁹ Martin v. Chicago & Milwaukee Electric R. Co., *supra*.

published and that a copy of said notice has been duly served upon such owners of the fee of the land to be condemned as could be found by the marshal within the District of Columbia, it is, on motion of counsel for the said commissioners this day of, 19.., ordered that the marshal summon a jury of five judicious, disinterested men, not related to any person interested in these proceedings and not in the service or employment of the District of Columbia or of the United States, to be empaneled and sworn by the court on the day of, 19.., at .. o'clock in thenoon, to assess the damages each owner of land to be taken may sustain by reason of the opening of an alley through part of in the District of Columbia, and the condemnation of the land necessary for the purpose of such opening, and to assess the benefits resulting therefrom, including the expenses of these proceedings, in accordance with the provisions of an act of Congress approved entitled "An act to amend chapter fifty-five of an act entitled 'An act to establish a code of law for the District of Columbia.' "

By the court,

.....
Associate Justice.

Return

Pursuant to within order summoned the following named persons as jurors (Name them) personally this day of, 19..

.....
Marshal.

3028 Jury, order accepting and to view premises (D. C.)

(Caption)

The marshal having summoned,, and, as a jury in the above entitled cause, as directed by an order passed herein on the day of, 19.., and the court having accepted said jury as qualified, and having administered to them an oath in accordance with the provisions of an act of Congress, approved, entitled "An act to amend chapter fifty-five of an Act entitled 'An act to establish a code of law for the District of Columbia,' " under which this proceeding was instituted, it is, by the court, this day of, 19.., ordered, that the said jury view the land and premises to be condemned herein, and thereafter, at .. o'clock in thenoon, on the day of, 19.., appear in this court and hear and receive such evidence as may be offered or submitted on behalf of the District of Columbia and by any person or persons having any interest in

these proceedings, under the supervision and direction of the court.

By the court,

.....
Associate Justice.

(Illinois)

(Caption)

And now comes the, by its attorneys,
and, also come, by their attorneys,

It is thereupon ordered by the court that this cause proceed to trial and a jury come for that purpose. Whereupon, come the following good and lawful men, to wit: (Insert names) who are duly empaneled and sworn to well and truly try the issues joined herein and a true verdict render according to the evidence adduced; and now said parties by their attorneys, move the court that said jury view said lands. And it is ordered by the court that said jury go upon the said lands in the custody of the sheriff of this county and view the premises. And it is further ordered by the court that said sheriff return into open court with said jury on, the day of, at .. o'clock .. M. And now said defendants by their said attorneys move the court that said petitioner file plans and specifications herein. And it is ordered by the court that said motion be and the same is hereby allowed and said petitioner is hereby ordered to file plans and specifications herein.

INSTRUCTIONS

3029 Eliminating defenses

The form of a verdict submitted to the jury must not eliminate from its consideration a substantial defense.¹⁰⁰

3030 Examination of premises

An instruction is erroneous which permits the jury to base their damages solely upon their personal examination of the premises, without regard to the testimony of witnesses.¹⁰¹

3031 Law and fact

The kind of road to be constructed and the manner in which and for what purposes it will be operated, are not questions of fact for the jury.¹⁰²

¹⁰⁰ Chicago Terminal Transfer R. Co. v. Chicago, 217 Ill. 343, 345, 346 (1905).

¹⁰¹ East St. Louis, Columbia & Waterloo Ry. v. Illinois State Trust Co., 248 Ill. 565.

¹⁰² East St. Louis, Columbia & Waterloo Ry. v. Illinois State Trust Co., *supra*.

In Michigan, the jury in a condemnation proceeding are the judges of the law and the facts; and the court may refuse to instruct them.¹⁰³

3032 Use of land

The probable use that the land might be put to, if it is of a character that would affect its present fair cash market value, is a proper element in the assessment of damages.¹⁰⁴

3033 Value of property, municipal privilege

The probable grant of municipal privilege or permission, if that constitutes an element which would add to the value of the property that is sought to be condemned, is a proper subject of a jury's consideration in forming its judgment with reference to the situation of the property and its requirements for specific purposes, whether it would be reasonable to grant such privilege, and whether the municipality would likely do so.¹⁰⁵

VERDICT

3034 Description of property

It is not essential to the validity of a verdict that it shall fully set out the description of the property, if the description is sufficiently made clear and certain by reference to the petition.¹⁰⁶

3035 Amount, separate interests, practice

The jury should fix by their verdict the value of the entire property sought to be condemned and then apportion the total value of the property among the several parties who are interested therein.¹⁰⁷ A jury may find a gross amount to be paid to the defendants where the petition alleges that the tract

¹⁰³ *McDuffee v. Fellows*, 157 Mich. 664, 668 (1909); Sec. 2, art. 18, Const. 1850 (Ill.).

¹⁰⁴ *East St. Louis, Columbia & Waterloo Ry. v. Illinois State Trust Co.*, 248 Ill. 567.

¹⁰⁵ *Chicago & Western Indiana R. Co. v. Heidenreich*, 254 Ill. 242, 243.

¹⁰⁶ *Prairie du Rocher v. Schoen-*

ing-Koenigsmark Milling Co., 248 Ill. 57, 63 (1910); *Helm v. Grayville*, 224 Ill. 283; *Suver v. Chicago, Santa Fe & California Ry. Co.*, 123 Ill. 299.

¹⁰⁷ *Chicago, Burlington & Quincy R. Co. v. Reisch*, 247 Ill. 350, 353 (1910).

of land is owned by several persons; in such a case, the presumption, in the absence of contrary evidence is that the persons are tenants in common.¹⁰⁸ But a jury must find the compensation due each owner of the particular tract belonging to him where the petition alleges several ownerships in several tracts of land.¹⁰⁹ The verdict should also find the amount of damages to the land not taken separately from the amount of compensation for the land taken, where there is evidence upon which a separation of damages can be based.¹¹⁰

In making awards for separate interests which are determinable, it is the duty of the jury to first fix the value of the entire property as between the petitioner and all of the defendants, and then to divide the same according to the defendants' respective interests. But in case a particular interest is in controversy between the defendants, separate awards are impossible, and a single or total award should be made, the amount to be paid over to the county treasury subject to the rights of the parties who are interested therein.¹¹¹

A condemnation verdict which is uncertain as to amount may be rendered certain by the record.¹¹²

3036 Leaseholds

The jury must fix the value of all of the leasehold interests in the premises sought to be condemned if there is evidence proving such value.¹¹³

3037 District of Columbia

(Caption)

We, the jury, in the above entitled cause, hereby find the following amended and supplemental verdict, and award damages for and in respect of the land to be condemned and taken for the opening of an alley through part of block numbered (Describe property) in the District of Columbia, as shown on the plat or map filed with the petition in this cause, amount-

¹⁰⁸ Grayville & Mattoon R. Co. v. Christy, 92 Ill. 337, 338 (1879); Suver v. Chicago, Santa Fe & California Ry. Co., 123 Ill. 292; Metropolitan West Side Elevated Ry. Co. v. Eschner, 232 Ill. 213.

¹⁰⁹ Grayville & Mattoon R. Co. v. Christy, *supra*; Suver v. Chicago, Santa Fe & California Ry. Co., 123 Ill. 298.

¹¹⁰ Suver v. Chicago, Santa Fe & California Ry. Co., 123 Ill. 299.

¹¹¹ Chicago & Northwestern Ry. Co. v. Miller, 251 Ill. 63.

¹¹² Illinois, Iowa & Minnesota Ry. Co. v. Powers, 213 Ill. 67, 69 (1904).

¹¹³ Chicago, Burlington & Quincy R. Co. v. Reisch, 247 Ill. 350, 354 (1910).

ing to the sum of dollars as set forth in schedule No., hereto annexed as part hereof.

And we, the jury aforesaid, hereby find the amount of benefits accruing by reason of the opening of said alley to be the sum of dollars, said sum being an amount equal to the aforesaid amount of damages awarded for and in respect of the land to be condemned for the opening of said alley, together with the expenses of these proceedings.

And we, the jury aforesaid, find that the lots or parts of lots or parcels of land which will be benefited by the opening of an alley in said blocks, as aforesaid, are the lots or parts of lots and parcels of land mentioned and described in schedule No., hereto annexed as part hereof; and we find that the several lots or parts of lots or parcels of land mentioned in said schedule No. will be benefited to the extent of the respective amounts mentioned and set forth in said schedule No.; and we hereby assess against the said lots or parts of lots or parcels of land, respectively, as and for benefits as aforesaid, the several amounts mentioned, specified and set forth in said schedule No.

Witness our hands and seals, this day of, 19...

(Signatures and seals)

(Attach schedule)

3038 Illinois

The form of verdict awarding compensation for land taken for right of way is:

We, the jury, find the fair cash market value of the defendant's land taken by the petitioner, and described in its petition, to be dollars.

When a cross-petitioner's land, which has not been taken, will be damaged by the petitioner's taking of land for right of way purposes and the construction, maintenance and operation of the railway, the form of verdict should be:

We, the jury, find the damages to defendant's land described in the cross-petition in this cause, that will not be taken by the petitioner as a right of way to be dollars.

When the cross-petitioner's land, under similar circumstances, will not be damaged, the verdict should be as follows:

We, the jury, find the defendant's land, described in the cross-petition in this cause, that will not be taken by the petitioner as a right of way, will not be damaged.

b

(Caption)

We, the jury empaneled to try the issues in this cause, do find and report that the just compensation to be paid by the said petitioner to the said defendant,, for his property as described in the petition filed in this case, which will be taken and appropriated by said petitioner for the uses and purposes set forth in said petition, to be the sum of dollars.

We further find that the remaining lands of said defendant, as described in the cross-petition herein, are not damaged.

We further find that the several sums aforesaid are full, fair and just compensation and damages for the taking and damaging of the several tracts of land by the petitioner, for the purposes set forth in the petition herein, and under the statutes of eminent domain and drainage.

(Twelve signatures)

c

(Caption)

We, the jury, find that the respondent,, a minor, who appears by, his guardian *ad litem*, is the owner in fee simple of premises known as (Give legal description) in the city of; and we, the jury, further find that said respondent is entitled to the sum of dollars in full compensation for the same being taken by the petitioner in this cause.

We, the jury, find that the respondent is the owner of a leasehold interest in the premises known as (Give legal description) in the city of which expires and improvements thereon situated; and we, the jury, further find that it is agreed by and between the counsel in this cause that the respondent is to receive from the petitioner dollars in full consideration for the value of said improvements; and we, the jury, further find that the respondent is entitled to the sum of dollars, the value of his leasehold interest aforesaid: total dollars, in full compensation for the same being taken by the petitioner.

And we, the jury, find that (widower) as aforesaid is entitled to the sum of dollars for damages to lots not taken, to wit: (Give legal description) as claimed in his cross-petition; and as to other lots for which damage is claimed in said petition, we, the jury, find the same not damaged.

(Signed, etc.)

3039 Michigan

(Caption)

We find that it is necessary to take the private property described in the petition in this cause, for the use and benefit of the public, for the proposed public improvement.

The just compensation to be paid for such private property we have ascertained and determined, and hereby award as follows:

| Description of each of the several parcels of private property to be taken | Owner, occupants, and others interested in each parcel | Compensation | To whom payable |
|--|--|--------------|-----------------|
| | | | |
| | | | |
| | | | |

114

OBJECTIONS

3040 Objections to confirmation (D. C.)

(Caption)

The respondent objecting to the confirmation of the verdict, award and assessment of the jury, in the above entitled cause, shows to the court that she is the owner of (Describe property), said property being improved by premises No., and that so far as said verdict and assessment award the sum of dollars, and assess the sum of dollars against the property of this respondent, the same should not be confirmed, but should be vacated, set aside, and for naught held for the following among other reasons:

1. Because the act under which the proceedings in this cause were held is void and unconstitutional.

2. Because the public interest did not require the opening of the said alley.

3. Because the verdict and assessment is arbitrary and unreasonable for the reason that it did not award to the respondent the fair and reasonable value of the property to be taken from her for the proposed opening of the alley; that respondent paid for said property the sum of dollars per square foot, in the year, and that said property has greatly increased in value since that time.

4. Because the verdict and assessment is arbitrary and unreasonable in that it assesses against the property of this respondent the sum of dollars for benefits assumed to re-

sult to said lots from the opening of said alley, while it assesses no part of the said award or benefits against, which is directly opposite respondent's lot and bears a similar relation to the proposed opening of said alley, and is benefited to a greater extent than respondent's lot, if any of the lots are benefited at all.

5. Because the award is further arbitrary and unreasonable in that it makes a uniform and arbitrary assessment of per linear foot upon all property abutting upon said alley, except the property of respondent, which, without reason, is assessed at a very much higher rate.

6. Because the award is further arbitrary and unreasonable in that it assesses benefits against other lots in an amount less than they are benefited, and they have assessed against the property of this respondent a sum greatly in excess of any benefit, said lot having in fact been greatly damaged by the taking of the portion sought to be condemned, and in no way benefited. Respondent's property fronts on two streets, and in addition had access to the already existing alley.

7. Because respondent did not have a proper opportunity to appear before said jury, and testify and produce others to testify, she having appeared at the court house in person on the day specified in the notice, and requested the clerk to enter her appearance in the cause, and diligently sought the hearing of the said jury, but was unable to obtain a hearing before them, or to ascertain the place where their sessions were held.

For which said several reasons, and for others apparent on the record, this respondent submits that the said alleged verdict and award and assessment is wholly void and without effect, and that the same should be vacated and set aside.

.....

.....
Attorney.
(Verification)

3041 Motion for confirmation (D. C.)

(Caption)

And now come the commissioners of the District of Columbia, by their attorneys, and move the court to finally ratify and confirm the verdict, award and assessment of the jury filed herein on the . . . day of, 19.., notwithstanding the exceptions filed thereto.

.....
Attorneys for petitioners.

(Add notice to call up)

Order

(Caption)

Upon motion of the commissioners of the District of Columbia, the petitioners herein, and argument of counsel upon the

exceptions and objections filed to the verdict of the jury returned herein having been heard and considered, it is, by the court, this day of, 19.., ordered, adjudged and decreed that the said objections and exceptions be, and they are hereby, overruled, and the said verdict, award and assessment of the jury returned herein on the day of, 19.., is hereby in all respects finally ratified and confirmed and the land necessary for the opening of an alley through part of (Describe property) as shown upon the plat or map filed with the petition in this cause is hereby condemned.

By the court,

.....
Justice.

b

(Caption)

On motion of the petitioners, the commissioners of the District of Columbia, and, it appearing to the court that no objections or exceptions have been filed to the amended and supplemental verdict of the jury returned herein on the day of, 19.., it is, by the court, this day of, 19.., ordered that the said verdict, award and assessment be, and the same is, hereby in all respects finally ratified and confirmed and that the land described in the petition as being necessary for the opening of an alley through part of block and part of block No. in the District of Columbia, be, and the same is hereby, adjudged condemned for the purpose aforesaid.

By the court,

.....
Justice.

3042 Motion to vacate and re-commit (D. C.)

(Caption)

Now come the petitioners, the commissioners of the District of Columbia, by their counsel and move the court to set aside and vacate its order passed herein on the day of, 19.., ratifying and confirming the verdict of the jury filed herein on the day of, 19.., and to re-commit the case to the jury. For cause therefor said petitioners, by their counsel, show as follows:

That the said verdict included an assessment for benefits amounting to against a certain parcel of ground described in said verdict (Describe property) in the District of Columbia.

That at the time these proceedings were instituted, said original lot numbered had been subdivided so as to comprise

two several and distinct lots described as lots numbered of the Commissioners' Subdivision which subdivision of lot number had been duly recorded in the office of the surveyor of the District prior to the institution of these proceedings, said subdivision having been made and recorded in the interim between the forwarding by the commissioners of the original plat of land to be condemned, and the institution of these proceedings.

That said lots numbered, comprising the parcel of land formerly known as lot number, are now, and were at the time of the institution of these proceedings owned by different persons, and of the said lots, lot numbered alone abuts on the alley for the opening of which these proceedings were instituted.

That in consequence thereof the assessment as levied by the jury herein is unenforceable in its present form, and in order to make it effective it is necessary that the verdict be re-committed to the jury in order that they may reform it, in view of the changed condition resulting from the aforesaid subdivision.

.....
Attorney for petitioners.

(Verification)

Order

(Caption)

The cause coming on upon the motion of the petitioners herein to vacate the order of the court passed herein on the day of, 19.., ratifying and confirming the verdict of the jury herein filed on the day of, 19.., and to re-commit the case to the jury; it is, by the court, this day of, 19.., ordered, that the said order of the court passed herein on the said day of, 19.., be, and the same is hereby, vacated and set aside, and that the cause be re-committed to the jurors heretofore summoned herein, with instructions to re-consider, and as they may deem proper, to reform their verdict in view of the facts set forth in the motion of the petitioners aforesaid.

By the court,

.....
Justice.

JUDGMENT

3043 Conditional, practice

Under the Illinois Local Improvement act, the condemnation judgment is conditional up to the time of the petitioner's elec-

tion to enter a final judgment as to all of the defendants, and no final judgment can be entered as to all of the defendants until judgments had been obtained against them all, including those who own property and those who are assessed as to benefits, subject to certain exceptions.¹¹⁵

3044 Dismissal

A judgment dismissing a condemnation petition as to a certain parcel of real estate is separate and distinct from a judgment of condemnation as to any other parcel of land, although both pieces of property are owned by the same person.¹¹⁶

A court has power under the Eminent Domain statute, to dismiss a condemnation petition where petitioner fails to prosecute it with diligence and where no sufficient excuse is presented for the delay.¹¹⁷

3045 Description of property

A judgment in condemnation should either describe, with reasonable certainty, the property sought to be taken, or the judgment should refer to a proper description contained in the petition.¹¹⁸ A condemnation judgment describing the property taken by meets and bounds is not uncertain as to a leasehold interest involved, if, by reference to the verdict, the petition and the cross-petition, the description of the land damaged and of the leasehold interest sufficiently appears.¹¹⁹ A defective description in a petition renders the judgment void for uncertainty.¹²⁰

3046 Use of land, *res judicata*

A court's determination that land which is sought to be condemned is reasonably necessary will be conclusive in a collateral proceeding upon the question that the land is reasonably capable of being used for the purpose for which it is condemned,

¹¹⁵ *Evanston v. Knox*, 241 Ill. 467.

¹¹⁶ *Chicago & Milwaukee Electric Ry. Co. v. Chicago & Northwestern Ry. Co.*, 211 Ill. 359.

¹¹⁷ *Sanitary District v. Chapin*, 226 Ill. 501.

¹¹⁸ *Helm v. Grayville*, 224 Ill. 283; *Suver v. Chicago, Santa Fe & California Ry. Co.*, 123 Ill. 299.

¹¹⁹ *Peoria, Bloomington & Champaign Traction Co. v. Vance*, 234 Ill. 36, 41 (1908).

¹²⁰ *Chicago, Ottawa & Peoria Ry. Co. v. Rausch*, 245 Ill. 477, 482 (1910).

but it will not be conclusive upon the question of whether the use of the property will become impossible.¹²¹

3047 Damages and execution, practice

In a judgment for damages found by a jury, the award of an execution therefor against the petitioner is appropriate where it has taken possession of the land before trial, but the rendering of such a judgment and the awarding of an execution is improper where the land is not so taken.¹²²

3048 Payment, practice

An order for the payment of compensation must direct payment to be made either to the party entitled thereto, or to the county treasurer, a court has no authority to direct payment to be made into court subject to its order and disposition.¹²³ It is proper to require the parties to present to the court their respective claims to the fund whenever there are conflicting claims.¹²⁴

3049 Costs

The costs of condemnation in the trial court and on appeal by the petitioner must be borne by the petitioner, as the land owners are entitled to full compensation, without deduction for any part of the costs incurred in the ascertainment of the amount.¹²⁵

3050 Illinois, general judgment

(Caption)

Now comes the petitioner by, its attorneys, and, the defendants,, by, their attorneys, and the railroad company, a corporation, by, its attorney, and the defendants, (Insert names) came not, but herein made default.

And it appearing to the court that the hearing on the petition herein had been duly set by the court for the day of

¹²¹ Bell v. Mattoon Water-Works Co., 245 Ill. 550.

¹²² St. Louis v. Southeastern Ry. Co. v. Teters, 68 Ill. 150.

¹²³ McCormick v. West Park Commissioners, 118 Ill. 661; Secs. 10 and 14, c. 47, Rev. Stat. (Ill.).

¹²⁴ Metropolitan West Side Ele-

vated Ry. Co. v. Eshner, 232 Ill. 214; Eddleman v. Union County Traction & Power Co., 217 Ill. 420, 421.

¹²⁵ Peoria, Bloomington & Champaign Traction Co. v. Vance, 251 Ill. 263, 264, (1911.)

....., 19 .., at the hour of o'clock A. M.; and it further appearing to the court that on said day of, 19.., said cause was duly continued on motion of petitioner to, 19.., at .. o'clock A. M., and *alias* summons ordered issued for defendants herein; that on said day of, 19.., said cause was duly continued by agreement to, 19.., at the hour of .. o'clock; that on, 19.., petitioner was allowed to file an amendment to the petition by order of court and the hearing on preliminary proofs was continued by agreement to the day of, 19..; that the hearing of said cause before the jury was set by order of court for, 19.., at ten o'clock; that the defendant, the, appeared and demurred to the petition herein; that said demurrer was then and there overruled; that upon, 19.., preliminary proofs were duly heard, and time for further hearing thereon set for, 19..; that on said day of, 19.., preliminary proofs were heard and concluded; that defendants moved to dismiss the petition herein, and that said motion was overruled and continued; and that defendant, the company, objected to the empaneling of a jury, which said objection was then and there overruled and denied. And thereupon, the court doth find that due service of process has been had by personal service upon all of the defendants, that is to say (Insert names); that the court has jurisdiction of the persons defendant and of the subject matter herein.

And it appearing to the court that all of preliminary proofs precedent to the empaneling of a jury had been duly made and an order thereon entered by the court herein for the empaneling of a jury, the jury is duly called as provided for by law. And it appearing to the court that the penal is not full by reason of non-attendance and exhaustion from challenges, the court orders the issuance of a venire by the clerk returnable instant for the following named persons, to wit: (Insert names of person). Upon due examination by the respective parties hereto, the following named veniremen on the original penal were accepted by all parties hereto, to wit: (Name person accepted); and upon due examination the following veniremen designated by the court were accepted by both parties, to wit: (Name accepted persons). And it appearing to the court that all of said jurors above named possessed the proper qualifications and that all of said jurors were acceptable to all of the parties herein, they were duly empaneled and sworn to try said cause.

Thereupon, the defendants filed their separate cross-petitions alleging ownership of and damages to certain lands of the respective defendants, as therein respectively described; and on said day of, 19.., this cause

came on to be heard upon the petition herein and the cross-petitions filed, as aforesaid.

And the petitioners and all parties defendant, except the, demand that the jury view the premises; and the appear and present objections to the viewing of said premises, which said objections were overruled and denied; and the court thereupon ordered the jury to go upon the land to view the premises, in charge of the sheriff and to return into court on the day of, 19.., at .. o'clock M. Thereupon, defendants move for a rule on petitioner to furnish plans and specifications, which rule was allowed; and, on the said day of, 19.., the jury returned into court and petitioner moves to amend petition by interlining in red ink, which leave was granted accordingly, and petitioner files stipulation "A" together with plans and profiles, and rule on petitioner to furnish plans and specifications is satisfied and discharged, to which said discharge, defendants object and except; and thereupon, the court and jury proceeded to hear evidence; and stipulation was duly filed and presented by petitioner relating to lands of, and stipulation as to bridges, which said stipulations are in words and figures, to wit: (Insert stipulations). It is therefore ordered, adjudged and decreed by the court that the petitioner, or some one in its behalf, pay to the said defendant, or to the county treasurer of this county for him, within one year from this day, the compensation and damages so awarded to him by said jury, to wit, dollars and cents, being the amount fixed by said jury in and by their verdict, as full compensation for the taking by petitioner of the following described tract of land, to wit:

A certain strip of land feet in width (Insert legal description), said tract containing acres, and being also the full compensation for damages to the property described and to the property not taken described in the cross-petition of

It is further ordered, adjudged and decreed by the court upon the payment of the sum aforesaid, the district, petitioner herein, may enter upon the above described land and property and use the same for the uses and purposes set forth in its petition herein.

(Repeat the last three paragraphs for each owner and parcel of land)

And defendants object and except to said order and judgment, and pray an appeal therefrom to the supreme court of the state of Illinois; which appeal is allowed upon their filing bond in the sum of dollars to be approved by the court: bond to be filed within days; bill of exceptions within days from the date thereof.

....., Judge.

3051 Illinois, interurban railroad

(Caption)

This cause coming on to be heard this day of, 19.., being one of the days in vacation after the term of said court, on defendant's motion for a new trial, which motion is herein overruled, defendant excepting and praying an appeal to the supreme court, and it appearing to the court that the petitioner filed its petition in said court on, 19.., and that thereupon the judge of said court indorsed upon said petition an order in the words and figures following, to wit: "Presented Hearing set for, 19.., at .. o'clock .. M., Judge."

And it appearing to the court that thereupon the clerk of the county court of county caused a summons in due and regular form of law to be issued, directed to the sheriff of county, commanding him that he summon the defendant, the, to be and appear before the said court, on the day of, 19.., which said summons was afterward returned by said sheriff, endorsed as follows: "I have served this writ on the within named, a corporation, by reading and delivering a true copy thereof to, president of said corporation, this day of, 19..,, Sheriff, by, Deputy."

And on the said day of, 19.., by agreement made and entered into between, attorneys for petitioner, and, attorney for defendant, on the day of, 19.., said cause was continued for hearing until the day of, 19.., and a jury were drawn to appear at M., of that date. And thereupon the judge caused a written order for a special jury venire, ordering the clerk of the county court of said county to write the names of disinterested freeholders of the county, on slips of paper, and in the presence of two disinterested freeholders, caused to be selected from said names, twelve persons to serve as jurors; said selection to be made by lot and without discrimination. And said clerk was further ordered to thereupon issue a venire directed to the sheriff of county, commanding him to summon the twelve so selected as jurors, to appear at the court house in said county, at ... M., on the day of, 19..

And the said defendant, the, also on the said day of, 19.., filed its certain traverse of and motion to dismiss the petition of the in said proceeding; and said traverse and motion to dismiss said petition, coming on to be heard by the court, on the day of, 19.., and the court having heard the same and considered the evidence offered in support and in denial of the traverse and motion to dismiss, and being fully advised in the premises, did overrule said traverse and motion. And on said

.... day of, 19.., by agreement made and entered into between the, by, its attorneys, and the, by, its attorney, the jury were ordered to appear on the day of, 19..; to which time said cause stood adjourned.

And this cause coming on for further hearing on the day of, 19.., petitioner introduced in evidence a certified copy of its charter and a stipulation, by and between the said parties respectively, by their respective attorneys, that the court should find that certain facts were admitted on both sides and should be considered by the court as fully and to the same extent as if the evidence had been offered and received thereto and, so far as the same are material, they should be incorporated in the decree and final order of the court, which stipulation is in words and figures as follows, to wit: (Insert stipulation, omitting caption and signatures).

And thereupon the said defendant, by, its attorney, filed its demurrer to the petition of petitioner, and the court having heard the argument of counsel and being fully advised in the premises, overruled said demurrer.

And the court having duly considered the preliminary evidence and the stipulations herein filed, and being fully advised in the premises, doth find that the petitioner is a railroad company duly incorporated under the laws of the state of Illinois, and as such it is authorized to own, maintain and operate the line of railroad in question; that it has located the said line of railroad in accordance with its charter; that said line, as so located, intersects and passes over the lands hereinafter described; that it is necessary for the petitioner for its corporate purposes, to take, appropriate and use for its right of way purposes and for its railroad facilities and appurtenances, the real estate hereinafter described; that said lands and premises are situate in the said county of, and state of Illinois, and are more particularly described as follows, to wit: (Set forth legal description); that the lands above described are owned in fee simple by the said defendant, the,; that the petitioner has made an effort to agree with the said owner, the, upon a price for the land sought to be taken, but has been unable to agree with said defendant as to the proper or just compensation to be paid by the petitioner for said lands taken of which defendant is the owner, and by reason thereof it had become necessary to institute condemnation proceedings under the law of eminent domain in force in this state; and that the petitioner is therefore entitled to take possession of and use said lands for the purposes above mentioned, and to have the compensation and damages for so doing ascertained and reported as provided by statute.

And thereupon the defendant, the, filed its cross-

petition, averring that it is the owner of the land described in the petition filed by the petitioner; that the, is the owner of other lands contiguous thereto, to wit: (Insert legal description); that the said lands so sought to be taken in this proceeding are of great value; that by reason of the taking of such part and portion of the said lands as described in said petition, the remainder of the property of the will be greatly damaged and depreciated in value; and that said property of the will be depreciated in the *ad damnum* of dollars; and praying that compensation and damages as to all of the said lands may be awarded to said defendant. And the said defendant afterward, to wit, on the . . . day of, 19.., by leave of the court first had and obtained, amended said cross-petition, and increased the *ad damnum* asked for in the original cross-petition to the sum and amount of dollars.

And thereupon this cause came on to be heard on the petition herein and the cross-petition filed by the defendant, the, before, to wit: (Name all of the jurors), twelve good and lawful men, freeholders of said county, who were regularly selected, summoned, empaneled and accepted by the petitioner and by the defendant, as a jury in the above entitled cause.

Said jury having taken the oath required by statute to well and truly ascertain and report to the court the just compensation and damages to be allowed to the owners and parties interested in said petition, said cause proceeded to a hearing.

And thereupon it was stipulated and agreed in open court by the petitioner that: "At no time after the completion of the construction of the said road and after such time when the said road is running and operating its railway shall the said company, or its successors or assigns, at any time that said successors or assigns shall operate said railway, use or employ or allow to be used or employed, fire or locomotive steam engines, but that all motive power shall be electric or other power excepting steam locomotive power." And it was further stipulated and agreed in open court by the petitioner that (Set out specific matter of agreement).

And the said jury having heard all the evidence introduced and, at the request of the petitioner, having visited and inspected the lands described in said petition, and, at the request of the defendant, having visited and inspected the lands and buildings described in the cross-petition, retired to consider of their verdict, in charge of an officer of this court, and having considered the same and agreed upon their report, returned into court and submitted their said report in writing; and the court having inspected said report and verdict, ordered that the same be approved and recorded; which report and

verdict is in the following words and figures, to wit: (Set out verdict).

And it appearing to the court from the said verdict that the sum aforesaid is just, fair, reasonable and full compensation to be paid to said defendant for the use and occupation of said premises, and is just, fair, reasonable and full compensation to be paid to said defendant for the damages to its said premises not taken in this proceeding, it is therefore ordered, adjudged and decreed that the petitioner, or some one in its behalf, pay to the said defendant, the, or to the county treasurer of said county, for said defendant, within days from this date, the compensation and damages so awarded and allowed by said jury, to wit, dollars.

It is further ordered, adjudged and decreed by the court that upon the payment of the aforesaid sum said petitioner, the, be let into possession of the hereinbefore described lands of said defendant, the, on condition that it will carry out its said stipulations as to the motive power, overhead crossings, surface crossings, and for private switch crossings across the tracks and right of way of petitioner; and in consideration thereof that said petitioner have, hold and use the said first hereinbefore described lands for railroad purposes, in accordance with the provisions of the eminent domain law of the state of Illinois; and that said sum be in full compensation and damages for the taking and using of the real estate first hereinbefore described, and of all damages to the premises of the defendant described in his cross-petition not so taken.

It is further ordered, adjudged and decreed by the court that a copy of this decree be filed in the office of the recorder of deeds of this county, and indexed to the tracts of land hereinbefore described, and that petitioner pay the legal costs of this proceeding. To all of which rulings said defendant excepts.

And thereupon the defendant, the, prays an appeal to the supreme court; which appeal is granted upon condition that the said defendant file its appeal bond herein within days from this date, in the penal sum of dollars, with surety to be approved by the court.

It is further ordered that leave be, and the same is hereby granted said defendant to present its bill of exceptions herein within days of this date.

It is further ordered and decreed that said petitioner shall have the right to enter upon and use the said property described in the original petition herein, upon entering into bond in the penal sum of dollars, with surety to be approved by the court, conditioned for the payment of such compensation as may be finally adjudged in this case.

.....
Judge.

3052 Michigan

State of Michigan, }
Recorder's court of the city of } ss.

In the matter of the petition of the city of, for the separation of grades of avenue and the railway companies.

Before judge

Upon the day of, 19.., as the commencement of judicial proceedings herein, and as appears by the said petition and agreement having heretofore made, under and by virtue of the statute in such a case made and provided by and between the city of, party of the first part, and, party of the second part, whereby the said party of the second part agreed to construct and complete the entire work involved in the change of the said grade at avenue and in the construction of the overhead crossing in accordance with the plans and specifications attached to said petition; and whereby the said party of the first part agreed to pay all damages, if any thereto, to the property of all persons other than the said party of the second part who may have an interest in said abutting property arising in any way in the change of grade of said avenue or intersecting streets, as proposed by said plans and specifications; and whereby, further, it was agreed that the said second party should and did relinquish all claim for damages occasioned by said change of grade; and it further appearing that, upon the filing of the petition herein, all of the parties in interest were duly served by summons duly issued, and that the said parties duly entered their appearance by counsel herein, and this cause after having been adjourned from time to time, was brought on for trial before the honorable of this court on the day of, 19.., and upon this last named date, it further appearing that a jury, as required by statute, was duly empaneled herein:

The court and jury thereupon proceeded with the trial of said cause, and having heard the evidence presented herein in full, and after hearing the argument of counsel and the charge of the court, retired under the charge of officers duly sworn to attend them, to consult upon their verdict; and the said jury having been absent for a time returned into court again upon the day of, 19.., and having been inquired of as to their verdict did report their verdict in writing; whereupon, said report and verdict were filed with the clerk.

And the said jury having reported in their verdict that it is necessary to separate said grade as described in the manner herein; and further the said jury having reported in writing as to each distinct parcel of land damaged by the said separation of grades, and having awarded to the owners, occupants

and others interested in each of said parcels the compensation to be paid for the damages sustained by separation of grades to each of said parcels; and it further appearing that the following is a correct description of each parcel of real estate, for damages to which, compensation is by said verdict awarded, and that the parties in interest to whom such compensation is awarded, and the amount of said award to such parties is as follows:

| Description of each of the several parcels of private property damaged | Owners, occupants and others interested in each parcel and compensation | | To whom payable |
|--|---|--|-----------------|
| | | | |
| | | | |
| | | | |

Subsequently and within the time provided by statute, the petitioner, viz., the city of, filed a motion for a new trial, as to the following respondents, to wit: (Name respondents) which motion was subsequently denied by said court. And more than two days having elapsed since the rendition of the verdict, and no other motion for a new trial having been made, on motion of, corporation counsel, and attorney for petitioner:

It is hereby ordered, on this day of, 19.., that the verdict of the jury in this matter be and the same is hereby confirmed as to all awards made.

It is further ordered that the amount as aforesaid awarded by the jury to the said respondents be paid to them by the city of within days from the date of this order.

.....,
Judge of recorder's court..

APPEAL AND ERROR

3053 Order appealable

No appeal from an order which determines conflicting interests is necessary until final judgment.¹²⁶ A final order disposing the fund or the damages in a condemnation proceeding is appealable.¹²⁷

¹²⁶ Chicago v. Pick, 251 Ill. 597, 599. ¹²⁷ Chicago & Northwestern Ry. Co. v. Glos, 239 Ill. 28.

3054 Separate appeals, parties

Each property owner has the right to, and must prosecute a separate appeal in a condemnation and special assessment proceeding, as a judgment in such a proceeding is several as to each tract or parcel of land; and each appellant must prepare and rely upon his own bill of exceptions.¹²⁸ Parties having different interest must appeal separately from such portion of the judgment which affects them.¹²⁹ An appeal from a judgment which settles disputed claims between different defendants does not involve the condemnation of the property or the rights of the petitioner, and the latter is not a party to it.¹³⁰

3055 Writ of error

In Illinois, an appeal and not a writ of error is maintainable to review a condemnation judgment.¹³¹

3056 Jurisdiction, court

An appeal from a condemnation judgment must be taken to the supreme and not to the appellate court.¹³²

3057 Claim of appeal (Mich.)

(Caption)

Now comes the said petitioner,, and claims the benefit of an appeal to the supreme court from the confirmation of the award as to respondents rendered in said cause by said court on the day of, 19..

Dated, etc.

.....
Petitioner's attorney.

3058 Bill of exceptions, necessity

A bill of exceptions is necessary to bring before the supreme court objections which do not appear on the face of a condem-

¹²⁸ Kalish v. Chicago, 219 Ill. 133, 135 (1905).

¹²⁹ Sangamon County v. Brown, 13 Ill. 207, 211 (1851); Chicago & Northwestern Ry. Co. v. Garrett, 239 Ill. 300, 301.

¹³⁰ Chicago & Northwestern Ry. Co. v. Miller, 251 Ill. 64.

¹³¹ Sweeney v. Chicago Telephone Co., 212 Ill. 476.

¹³² Prairie du Rocher v. Schoening-Koenigsmark Milling Co., 251 Ill. 341, 343 (1911); Sec. 12, Eminent Domain act (Ill.).

nation record.¹³³ A motion for a continuance to enable the *cestui que trust* to become a party to a condemnation proceeding is no part of the record without a bill of exceptions.¹³⁴

3059 Bill of exceptions (Ill.)

(Caption)

Be it remembered that at a term of the court of county, in the state of Illinois, began and held at the court house in said county on the of in the year, 19.., came on to be tried and determined the compensation to be paid to divers persons among whom were, for their rights and interests in property held and so owned by them respectively, some in fee simple and others as lessees of the fee owners by the, under a petition filed by said company in said court on the day of, in the year 19.., and the jury of which mention is made in the record of this cause being called, also came, who were selected, empaneled, chosen and sworn; and an oath was administered to them in the following words, namely, "You and each of you do solemnly swear that you will well and truly ascertain and report just compensation to each owner of the property which it is sought to take or damage in this cause, and to each person therein interested, according to the facts in the case as the same may be made to appear by the evidence, and that you will truly report such compensation so ascertained; so help you God."

And before said jury were sworn as aforesaid, the said petitioner, by its attorney, moved the court to direct and order who of the persons named in said petition as owners or claimants of parcels of property in said petition described should have their respective rights investigated and determined by said jury.

And upon the said investigation and trial before the said jury the said offered and read in evidence to said jury a lease bearing date the day of, 19.., between as lessor and the said as lessee, wherein, and whereby there was leased by the said to said all those premises situate, lying and being in the city of, in the county of and state of Illinois, known and described as the (Give description), to have and to hold said premises from the day of the date of said lease to the day of, in the year 19.., the said yielding and paying rent for said premises the sum of dollars per year

¹³³ Kalish v. Chicago, 219 Ill. 134.

Waterloo Ry. v. Illinois State Trust

¹³⁴ East St. Louis, Columbia &

Co., 248 Ill. 561.

in advance, payable every months from the date of said lease. And the said also proved that situated upon said leased premises was a dwelling house known by the street number as; and the said also produced and read in evidence to said jury a bill of sale bearing date the day of, 19.., from to, wife of said, whereby and by means whereof, the aforesaid dwelling house was bargained, sold and delivered by the said to the said, and the same in the said bill of sale is described as (Give description). And which bill of sale was filed for record in the office of the recorder of deeds of said county of and state of Illinois, on the day of the month and year last aforesaid, and the same was recorded in book of records, page And thereupon, after the said bill of sale had been read in evidence as aforesaid, the said petitioner, by leave of the court, amended the aforesaid petition by writing therein on the page thereof after the name the following and "....." And upon the said investigation and trial before the said jury the said, by witnesses, proved that the value of the said unexpired term mentioned in the aforesaid lease was worth the sum of dollars over and above the aforesaid dollars per year to be paid as rent as stipulated in the said lease, and that the said house and other improvements on the said lot and which house was numbered as aforesaid, was worth dollars. And the said proof was not contradicted or controverted by any evidence produced before the said jury.

And the said petitioner before the aforesaid evidence was produced before the said jury, for the purpose of showing that it had the right to take for railway purposes the property described in the said petition, produced and read in evidence certain copies of agreements of consolidation purporting to have been made between different railway corporations, certified by the secretary of state of the state of Illinois, under the great seal of said state; and which agreements so certified were respectively in the words and figures or of the tenor and effect following, that is to say: (Here the clerk will insert said certified copies of agreements). And the said petitioner by its attorney also produced in the printed volume of the statutes of the said state of Illinois, an act entitled "An act to incorporate the, " approved, and is on pages; and the said attorney claimed that under the aforesaid Act and the above referred to agreements of consolidation, without any further or other proof of right or authority to exercise the right of eminent domain, that the said petitioner had the right

and the authority to appropriate to its use, for right of way, all of the property described in the said petition upon making just compensation therefor; and no other proof of authority to take said property or any part thereof, for such aforesaid purpose was produced to said jury; that the said and the other claimants before said jury claimed that said petitioner had no such authority, and they severally objected to said petitioner's reading in evidence the aforesaid certified copies of agreements of consolidation, or to the introducing of any evidence whatever before the said jury, on the ground that it was not shown in and by the said petition that the said petitioner had any right whatever to take and appropriate to its own use, in the exercise of the right of eminent domain, any of the property described in the said petition; but the said objection was overruled by the said court. To which decision the said, by their attorney, did then and there except.

And after the aforesaid evidence had all been produced as aforesaid before the said jury, the said jury were sworn to well and truly try and a true verdict render upon the issues joined between the said petitioner and, and others according to the evidence; which issues were made upon the following pleadings, to wit: (Insert copies of pleadings). But to the said jury being sworn to try the said issues as aforesaid, the said, by their attorney, objected; which objection was overruled by said court, and to which ruling and decision the said, by their said attorney, did then and there except.

And after all the aforesaid evidence was produced before the said jury, and also all other evidence between the said petitioner and the other claimants, the said, by their said attorney, asked the said court to instruct the said jury as follows, that is to say: (Insert copy of instruction). But said court refused to so charge the said jury; to which refusal of said court, the said, by their said attorney, did then and there except.

And thereupon, upon that subject, said court charged the said jury as follows, that is to say: (Insert copy of instruction). To the giving of which instruction to said jury the said, by their said attorney, did then and there except.

And the said court at the request of the said instructed the said jury as follows, that is to say: (Insert copy of instruction).

And upon the subject of the aforesaid issues, so as aforesaid made between the said petitioner and the said and others, the said court instructed the said jury as follows, that is to say: (Insert copy of instruction).

But upon the said issues the said jury did not return or give any verdict whatever. That upon the aforesaid instruc-

tions (and others which in no way affected the rights of the said, or either of them) and upon the aforesaid evidence and other evidence which in no way affected the rights of the said, the said causes, and all the matters therein before the said jury, were submitted to the said jury for their verdict; and thereupon the said jury retired to their room to consider of their verdict in the premises, and thereafter, and on the day of, in the year 19.., the said jury returned into said court their said verdict as to and so far as concerned the said, in the words and figures following, that is to say: (Copy of verdict).

And thereupon after verdict and before judgment, and on the day of, in the year 19.., the said filed their motion and moved the said court to set said verdict aside and to grant a new trial; which motion was and is in the words and figures following, that is to say: (Insert copy of motion). That upon the argument of said motion, the said court announced its opinion that all of the objections made to said verdict by said, could be obviated by giving judgment that they should have the right to remove the said house number within a reasonable time; and that the court then and there rendered such judgment, but to that being done, said, by their last aforesaid attorney, objected and claimed that the court, in giving judgment, must follow the verdict; that they had no place to which they could remove said house; that if said petitioner needed and had the right to take and occupy for right of way the ground upon which said house stood, it must take the property as it was, and make just compensation for the ground and the improvements; and that said respondents could not legally be required to move said house; but the said court gave as its opinion that the reverse of these views was the correct law, and thereupon, said court overruled the said motion to set aside said verdict and grant a new trial as to the said To which opinions of said court upon said motion, and to which decision overruling said motion and refusing to set aside said verdict and grant a new trial as to the said, by their last above named attorney, did then and there except.

And because the matters aforesaid do not appear of record by the aforesaid petition, cause, investigation and trial, the said, exhibit this, their bill of exceptions and pray that the same may be allowed, and that the said bill of exceptions may be made a part of the said record; which is done.

..... (Seal)

3060 Entry upon land

In Illinois, upon an appeal by either party, the petitioner may give the special bond required by statute and enter upon the use of the property, without paying or depositing the ascertained compensation.¹³⁵

3061 Delay of proceeding

In a condemnation proceeding disputes between the defendants will not delay the petitioner, as after an award has been made the parties may be heard on their claims against the fund.¹³⁶

PAYMENT OF JUDGMENT

3062 Abandonment, election

The election to pay a judgment of condemnation or to abandon the proceeding must be made within a reasonable time after the rendition of the judgment.¹³⁷

3063 President's directing order (D. C.)

The White House

.....
Upon consideration of the award of the commissioners appointed by the supreme court of the District of Columbia to appraise the values of square numbers and in the city of Washington, District of Columbia, and being of the opinion that the public interest requires that the same be accepted, I hereby direct that payment for said squares be made out of the money appropriated by Congress for that purpose to the respective persons entitled thereto, to be determined by the judgment of the court, as provided by section of the code of laws of the District of Columbia.

.....
President of the United States.

War Department

.....
I hereby certify that the foregoing is a true copy of the original.

(Seal)

.....
Secretary of War.

¹³⁵ *Prairie du Rocher v. Schoening-Koenigsmark Milling Co., supra*; Sec. 13, Eminent Domain act (Ill.).

¹³⁶ *Chicago & Northwestern Ry. Co. v. Miller*, 251 Ill. 63.

¹³⁷ *Winkelman v. Chicago*, 213 Ill. 363.

3064 Payment into court (D. C.)

(Caption)

To the supreme court of the District of Columbia.

The District of Columbia respectfully shows to the court that by act of Congress approved, amending the code of the District of Columbia, it is provided: "In case any of the owners of land heretofore or hereafter condemned for public use, whether under the provisions of said code or by virtue of any special or general act of Congress, are under disability or cannot be found, or neglect or refuse to receive the money awarded to them, or in case the record is imperfect or the title to the property is in dispute or uncertain, the money due the owners of the property for damages for land taken may be deposited in the registry of the supreme court of the District of Columbia, for the use of the rightful owners without cost or expense to said District, and thereupon the title to the land condemned shall become vested in the District of Columbia."

That on the day of, 19.., the jury in the above entitled cause returned their verdict and award of damages for and in respect of the land to be condemned and taken for the opening of an alley through part of (Describe property) in the District of Columbia, as will more fully appear by reference to the said verdict and award, the said verdict and award being finally ratified and confirmed by the court on the day of, 19..

That there was awarded damages for and in respect of part of lot, described in the proceedings as the owner, in the sum of dollars from which an assessment for benefits in the amount of dollars is to be deducted, leaving a balance due by the District of Columbia, which has not been paid, in the sum of dollars.

That an examination of the title to the property hereinbefore described, discloses the same to be vested in the said., subject however, to a certain deed of trust made by and her husband, dated, 19.., and recorded, 19.., of the land records of the District of Columbia in which said property is conveyed to, trustees, to secure in the sum of dollars.

That by reason of the premises the record title to the land hereinbefore described, is uncertain and your petitioners pray that the money due the owners of the property for damages for land taken may be deposited in the registry of the court for the use of the rightful owners, without cost or expense to the said District, in order that the title to the land condemned shall become vested in the District of Columbia.

. Petitioners.

. Attorney for petitioners.

(Verification)

*Order***(Caption)**

This cause coming on to be heard upon the petition of the commissioners of the District of Columbia herein filed on the day of, 19.., praying that the money due and awarded for and in respect of part of lot, described in the above entitled cause, be deposited into the registry of the court, it is, by the court, this day of, 19.., ordered, that in accordance with the prayer of said petition the following amount be paid into the registry of the court for the use of the rightful owner or owners thereof, without cost or expense to the District of Columbia.

The sum of dollars, being the amount awarded as damages, less the amount assessed as benefits, for and in respect of part, of lot, alleged to be owned by

By the court,

.....
Justice.

(Maryland)**(Caption)**

To the honorable, judge of said court.

The petition of respectfully represents unto your honor:

1, That there is now in possession of your petitioner the sum of dollars which was appropriated by the Congress of the United States under the act of among other things for the procurement of land or right pertaining thereto, needed for the site, location, construction or prosecution of the works for fortification and coast defenses.

2, That heretofore in the above entitled cause the said land was by judicial process condemned and a jury empaneled for that purpose in this court have found their inquisition and made their award for said land, and the same has been by the decree of this honorable court confirmed.

3, That the said award includes but a single parcel of land, which land is claimed by, the above named defendant.

4, That a bill has been filed in the court of county, state of, by wife of said for the purpose of having a certain ante-nuptial agreement entered into between said and his wife, in which each resigned all rights in the property of the other, set aside and declared null and void. In this bill said prays the court to adjudge her to be entitled to all her rights and interests in the property of said, situated in county,

of which the tract of land condemned by the United States as aforesaid constitutes a part; and that the said bill is pending and remains undecided in said court.

5, That there have been incurred certain costs and expenses in said condemnation proceeding which are proper to be paid out of said appropriation.

6, That the persons to whom said award, cost and expenses are payable, and the respective amounts, are as follows: (Insert award).

7, That your petitioner is unable to pay or tender said money to the parties entitled thereto otherwise than by availing himself of the decree of this court allowing the money to be paid into court for the use of the parties entitled thereto.

Your petitioner therefore desires to pay into court the said sum of dollars, the same being the total amount of the award, costs and expenses set forth in paragraph five of this petition, and prays that this honorable court shall superintend and supervise the payment of said award, costs and expenses and that the disbursement of said money, after the same is deposited in the registry of this court, shall be under the order and direction of this court.

To the end therefore that your petitioner may pay said award, cost and expenses to the persons named in the sixth paragraph of this petition or to the person or persons regularly entitled to the same and for the purpose of making said payment and tender and acquiring the title for the United States in said land and buildings, your petitioner prays that this honorable court will pass such an order as may be proper in the premises, and that upon the deposit of said money in the registry of the court that this honorable court will assume jurisdiction over the payment of said award, costs and expenses in the manner and for the purposes set forth in this petition.

And as in duty, etc.

.....
Attorney for, etc.

Order

(Caption)

It appearing to the court from the proceedings in this cause and from the foregoing petition of that there is payable by the United States for the purpose of acquiring lands, etc., at, condemned in these proceedings for the use of the United States as a site for fortifications, and for the costs and expenses attending said condemnation proceedings, as specifically cited in said petition, the sum of dollars.

Now, on the foregoing petition of said, as aforesaid, it is ordered this day of, 19..,

by court of for the
 that the money mentioned in said petition amounting to
 dollars, be paid into the registry of this court, and that this
 court assume jurisdiction of disbursement of the same to the
 persons who by said award may be entitled, in the manner and
 for the purposes mentioned in said petition, in payment of the
 amount of the said award, costs and expenses as therein speci-
 fied.

(Virginia)

(Caption)

This day came again the parties, and it appearing that the
 commissioners appointed by the order of this court, on the
 day of, 19.., have this day filed their report, bearing
 date the day of, 19.., in which said report they
 have allowed for the land and other property of the
 company proposed to be taken in these proceedings, the sum
 of dollars (\$.....), and for damages to the
 adjacent and other property of the company, the
 sum of dollars (\$.....), allowing no damages to
 the property of other persons, upon motion of the said
 railway company, leave is granted said railway
 company to deposit the said sum of dollars
 (\$.....) in the bank of, to the credit of the
 court in this cause; and the court doth order that the said
 railway company return the certificate of deposit
 of the said sum to the clerk of this court, to be filed with the
 papers in this cause.

3065 Distribution, claimants

The holder of an invalid tax-title cannot claim reimburse-
 ment for the amount of money paid for the tax-title and subse-
 quent taxes, out of compensation which has been awarded in a
 condemnation proceeding in which the entire property has
 been condemned and taken for a public purpose.¹³⁸

3066 Distribution, motion (D. C.)

(Caption)

Comes now the petitioner and moves the court to consider
 the evidence heretofore taken and filed in this cause, and the
 report of the auditor thereon, and to adjudge who are the par-
 ties entitled to receive the awards made by the commissioners
 for the several parcels of land condemned.

..... U. S. Attorney, D. C.
 Special Assistant U. S. Attorneys.

¹³⁸ O'Connell v. Sanford, 255 Ill.
 49, 50 (1912).

Take notice that the foregoing motion will be called up for hearing on next,, at o'clocknoon, before the justice holding the District court.

.....
Special Assistant U. S. Attorneys.

We severally acknowledge receipt of the foregoing motion.

3067 Distribution, order (Ill.)

(Caption)

And now again comes the petitioner by its attorney and the respondents, R, S, B and A, by their respective attorneys, and it appearing to the court that the petitioner has paid to the county treasurer of county the several sums awarded to the several respondents respectively for their damages herein as found by the judgment of this court, and the said respondents respectively, for the purpose of procuring a direction to the said county treasurer to pay to them respectively the amounts awarded to them in the said judgment, having consented to furnish and deliver to the petitioner, respectively, bonds with sufficient surety, each of said bonds being conditioned that if the petitioner shall prosecute its appeal in this cause with effect and the amount of the final judgment in this cause shall be less than the judgment heretofore entered herein that in such event the difference between the amount of such final judgment and the amount of the present judgment shall be paid by the obligors therein to the petitioner, the court thereupon directed that the said bond on behalf of the said R should be in the penal sum of (\$.....) dollars, and the said bond on behalf of A in the penal sum of (\$.....) dollars, and the said bond on behalf of B in the penal sum of (\$.....) dollars; and the said bond on behalf of S in the penal sum of (\$.....) dollars.

And it appearing to the court that the said several respondents have presented their said bonds so conditioned as aforesaid, and in the respective sums above named, and that the said bonds have been delivered to the said; and it having been stipulated by all the said respondents that the withdrawal of the said funds from the hands of the said county treasurer shall be without prejudice to the right of the petitioner to prosecute its appeal from the said judgment as heretofore prayed and allowed:

It is, therefore, ordered by the court that the county treasurer of said county pay to said R the sum of (\$.....) dollars; to the said B (\$.....) dollars; to the said A (\$.....) dollars, and to the said S (\$.....) dollars, and take their respective receipts therefor.

And upon consent of all the said respondents it is further ordered, adjudged and decreed by the court that the usual writ of possession issue against the following described premises, to wit: (Describe property).

But it is ordered by the court that the said writ be stayed for a period of four weeks from the date of entry of this order, the said writ to issue at any time after the expiration of said period upon the request of the petitioner, or its attorneys, without further order.

3068 Release (D. C.)

(Caption)

Whereas, by agreement between, grantor of lot, and his grantee,, the said is entitled to receive the award of damages in District court cause No., of the supreme court of the District of Columbia, and is to pay all benefits therein assessed against said lot;

And whereas, the said has directed, and does hereby direct the District of Columbia to pay the said award of damages to said, he, the said, hereby consenting that the assessed benefits to said lot in said case may be deducted therefrom;

And whereas, this release is a full settlement of both said award and assessment,

Now, therefore, this release witnesseth that the said, for and in consideration of the premises and the sum of dollars, to him in hand paid by the District of Columbia, the receipt of which is hereby acknowledged, does hereby forever release the District of Columbia of and from the sum of money to be paid to said as aforesaid, and hereby consents to the confirmations made of the verdict and award in said case, and hereby forever releases the District of Columbia of and from all claims and demands, injuries, damages, or otherwise, occasioned by the taking and condemnation of said property, and hereby ratifies and confirms the title to said District of Columbia to said real estate so taken and condemned; and releases, confirms and quit claims to the said District of Columbia, in fee simple, all his right, title, interest, and estate therein or thereto.

Witness my hand and seal this day of, 19..
 (Seal)

(Venue)

I,, a notary public in and for the District of Columbia, do hereby certify that, party to a certain deed bearing date on the day of, 19.., hereto annexed, personally appeared before me in the said District, the said, being

personally well known to me as the person who executed the said deed and acknowledged the same to be his free act and deed.

Given under my hand and seal this day of, 19..

Notary Public, District of Columbia.¹³⁹

3069 Satisfaction (D. C.)

(Caption)

We, the undersigned, attorneys of record in this cause, do hereby, severally, acknowledge the payment by the United States, through the office of public buildings and grounds, to the respective parties entitled, of the amount or amounts set opposite our respective names, in full satisfaction of the final judgment of the court herein in so far as said judgment pertains to the parcel or parcels of land in each instance indicated.

| Parcel or parcels | Paid to | Amount paid | Received by |
|-------------------|---------|-------------|-------------|
| | | | |
| | | | |
| | | | |

CONDEMNATION AND LIBEL

(Drug and Food Act)

3070 Libel

In the Supreme Court of the District of Columbia,
Holding a District Court.

| | |
|---------------------------|------------|
| United States of America, | } No. |
| Libellant | |
| v. | |
| Cases of a Drug and | } |
| Food known as "....." | |

To the honorable justice of the supreme court, holding an equity court.

The libel of the United States of America, by, its attorney in and for the District of Columbia aforesaid, who in this case prosecutes in its behalf, respectfully represents as follows:

1. This libel is filed by the United States of America, in its own right, and prays the seizure for condemnation of certain

¹³⁹ The foregoing release must be recorded upon the land records before it is filled in the case.

articles of food and drug, as hereinafter particularly set forth, in accordance with the act of Congress in such case made and provided, approved, (Part 7, Vol. 34, U. S. Statutes at Large, p. 738, commonly known as the Food and Drugs act).

2. Your libellant represents to the court that in the city of Washington, District of Columbia, and within the jurisdiction of this honorable court, are certain articles of drug and food, that is to say, a certain liquid preparation intended to be used both as a cure and mitigation of disease of man, and as a food and drink by man, of the particular description following: cases, more or less, of the said liquid preparation branded and labelled, ".....;" more or less, of said cases are now in the possession of and held by,; and cases, more or less, held by,

3. Your libellant further represents that the said cases, more or less, each case containing, to wit, bottles of the said liquid preparation, are illegally held within the jurisdiction of this honorable court, and for that the same are misbranded in violation of the act of Congress of,, and are liable to condemnation and confiscable as provided therein;

a. In that the said cases and each of them, and the said bottles and each of them, bear a certain label, statement, design and device which is false and misleading and tending to deceive and mislead the purchaser thereof, to wit, ".....," thereby importing and signifying that the said liquid preparation contained a medicinal product commonly known as, in a sufficient quantity to be an effective medicinal constituent in the use of said liquid preparation. Whereas, in fact, the quality and proportion of contained in said liquid preparation, is so small as to be non-effective as a medicinal agent in the use of the said liquid preparation;

b. In that the said liquid preparation contains alcohol, but the said cases, more or less, fail to bear any statement of the proportion and quantity of alcohol contained in said liquid preparation;

c. In that each of said bottles of said liquid preparation bears a certain statement, design and device, to wit, ".....," thereby importing and signifying that a certain person known as and called was connected with and instrumental in the formation and manufacture of said liquid preparation; which said statement, design and device is false and misleading in that no person by the name of, or known as, is in any manner connected with or instrumental in the formulation and manufacture of said liquid preparation;

d. In that each of said bottles of said liquid preparation contains the statement that the said liquid preparation is a blend, which said statement is false and misleading, in that the said liquid preparation is not a blend, but is in fact a compound, for the reason that the said liquid preparation is a mixture of unlike substances, to wit,;

e. In that the said liquid preparation is a compound within the meaning of the said act of Congress of,; yet each of said bottles of said liquid preparation fails to bear the statement that the said liquid preparation contained in each of said bottles is a compound;

f. In that the said cases, more or less, containing the said bottles of said liquid preparation, and each of said cases, fails to bear the statement that the said liquid preparation is a compound, as provided by the said act of Congress of,, although the said liquid preparation is in fact a compound as defined by the said act of Congress of, for the reason that it is a mixture of unlike substances.

4. Your libellant further represents that all of the matters above set forth are true; that the said cases, more or less, of said liquid preparation, have been transported from the state of to the District of Columbia, having been shipped by freight on,, by the, a corporation at, to said, a consignee at the city of Washington, District of Columbia,; that more or less, of said cases, remaining in the possession and custody of the said, have been distributed by him and are now in the possession and custody of the persons named in paragraph two hereof, other than, in the respective amounts set forth in said paragraph; that each and all of said cases and each and all of said bottles of said liquid preparation, now within the jurisdiction of this honorable court, remain unsold and in the original unbroken packages, in said District, and are offered for sale in said District; and that the said cases, more or less, each containing, to wit, bottles of said liquid preparation, and each and all of said cases and said bottles of said liquid preparation are intended to be sold and offered for sale within the District of Columbia.

Wherefore, in consideration of the premises, your libellant prays:

(1) That the said cases of said liquid preparation, and that each and all of the bottles of said liquid preparation, so, as aforesaid, described, be proceeded against and seized for condemnation, in accordance with the provisions of the said act of Congress, approved,; and that to this end this honorable court may order an attachment to issue in due form of law, according to

the course of this honorable court in cases of admiralty and maritime jurisdiction, so as far as is applicable in this case; and that the said, and the said, and other persons having or pretending to have any right, title or claim in and to the said articles of drug and food above mentioned and described, may be cited to appear herein and answer all and singular the premises aforesaid.

(2) That by a proper order, this honorable court may adjudge and decree that the said articles of drug and food aforesaid particularly described, be condemned at the suit of this libellant, according to the provisions of the said act of Congress, approved; that the same be disposed of by sale, under such terms and conditions as this honorable court, by appropriate order, may provide; and that the proceeds thereof, loss, legal costs and charges, by proper order, be directed to be paid into the treasury of the United States.

(3) That this honorable court may pass all such orders, decrees and judgments as may be necessary in the premises, and may grant your libellant a decree for the costs of this proceeding against the owners or the holders of the said articles condemned, should such costs not be paid out of the proceeds of the sale of the same, or otherwise.

(4) And that your libellant may have such other and further relief as the nature of the case may require.

United States Attorney in and for the District of Columbia.

(Verification)

Let the writ issue herein as prayed, returnable
at o'clock

Justice.

3071 Answer (D. C.)

(Caption)

The claim and answer of the, a body corporate, intervening for its interest in the said to the libel of the United States of America alleges as follows:

1. That this intervenor and defendant is a corporation duly organized and existing under the laws of the state, and is the true and *bona fide* owner of the described in the libel herein, and that no other person or corporation is the owner thereof.

2. That the defendant admits that the said merchandise was shipped by freight from the state of into the District of Columbia and is now within the jurisdiction of this court, and that said merchandise is still unsold and in the original unbroken packages.

3. That the defendant admits: *a* That the said cases of

..... and the bottles contained therein have upon them and upon each of them the words ".....;" but denies that said words are false or misleading or tend to deceive and mislead the purchaser thereof; and denies that said words impart and signify that the said preparation contains a sufficient amount of to be an effective medicinal constituent; and denies that the quantity and proportion of contained in said preparation is so small as to be non-effective as a medicinal agent.

b Said defendant admits that the preparation contains alcohol and that the cases containing the said bottles fail to bear any statement of the proportion and quantity of alcohol contained in said preparation; but denies that the absence of such statement on said cases causes them to be misbranded; and further alleges in this behalf that the labels on bottles containing the said and upon each of them bear a statement of the proportion and quantity of alcohol in said preparation.

c Said defendant admits that each of said bottles bears the words ".....," but denies that the use of said words is false and misleading, or false or misleading.

d Said defendant admits that each of said bottles contains a statement that the said preparation contained therein is a blend; but denies that such statement is false and misleading, or false or misleading, and alleges further in that behalf that said preparation is a blend of

e Said defendant admits that the bottles containing said preparation fail to bear the statement that the said preparation is a compound within the meaning and intent of the act of Congress of, 19.., commonly known as the Food and Drugs act.

f Said defendant admits that the said cases containing the said bottles fail to bear the statement that the said preparation is a compound; but it denies that the absence of such statement upon said cases causes them to be misbranded within the meaning of the Food and Drugs act; it denies that said preparation is a compound within the meaning of the said act of Congress; it denies that the said cases of goods are illegally held by it within the jurisdiction of this honorable court; it denies that the same are misbranded within the meaning and intent of the said act of Congress of,; and it denies that the said cases or the bottles contained in them are liable to condemnation and confiscation.

4. And this defendant avers that the said act of Congress, known as the Food and Drugs act, approved,, and upon which this libel is based, is unconstitutional and void, and that even were it constitutional, it is invalid on the ground of indefiniteness and uncertainty in that the offenses thereby intended to be created are not specifically

defined, and in that it contains an unlawful delegation of legislative power to others than administrative officers of the Federal government.

5. That all and singular the premises herein are true.

Wherefore, defendant prays this honorable court to pronounce against the libel aforesaid, to condemn the libellant in costs, and otherwise to administer right and justice in the premises.

.....
Attorneys for claimants.

(Verification)

3072 Authority to take samples (D. C.)

(Caption)

Upon motion of the libellant for an order authorizing it to take samples from the cases seized herein labeled ".....", for the purpose of analysis for trial herein, it is this day of, 19..., ordered that the said libellant be and it hereby is authorized to take three bottles from the cases labeled ".....", seized herein, for the purpose aforesaid.

By the court,

.....
Justice.

3073 Judgment (D. C.)

(Caption)

Upon motion of the United States for judgment of condemnation in the above entitled cause, and it appearing to the court that upon the libel filed herein on the day of, 19..., the marshal of the United States for the District of Columbia has seized, valued at dollars, of; and it further appearing to the court that the claimant of the said, so seized as aforesaid,, a corporation, has entered its appearance and filed herein its answer, to the libel and has agreed through its attorneys', with attorney of the United States in and for the District of Columbia, upon a statement of facts filed herein on the day of, 19...; and it further appearing that in and upon the labels and devices upon said cases and bottles there is no statement of the quantity and proportion of alcohol contained in said liquid preparation, and that the said liquid is a medicinal preparation and contains alcohol; and it further appearing that the said cases and bottles were shipped from the state of to the District of Columbia, and remain in said District in original and unbroken packages, and further that at the time of the seizure herein the said cases and bottles were

offered for sale in said District, it is this day of, 19.., ordered, adjudged, and decreed, that the said of the said food and drug now in the custody of the United States marshal, are misbranded within the meaning of the act of Congress, approved, 19.., in that the labels upon said cases and bottles do not bear a statement of the quantity and proportion of alcohol contained in said liquid preparation; it is further ordered that the said and the bottles of said liquid preparation contained therein, be and they are hereby condemned, and they shall be disposed of by sale by the said United States marshal under such terms and conditions as will not violate the provisions of the said act of Congress, approved, 19..; it is further ordered that the respondent,, pay all of the costs of these proceedings; provided, however, that upon the said respondent,, paying all the costs of these proceedings, and executing and delivering to the said United States a good and sufficient bond with surety to be approved by the court, in the penal sum of dollars, conditioned that the said, and the bottles of said liquid preparation contained therein shall not be sold or in any manner whatever disposed of contrary to the provisions of the said act of Congress, approved, 19.., the said United States marshal shall re-deliver and surrender the cases of to the respondent in lieu of the disposition by sale as aforesaid.

By the court,

.....
Justice.

3074 Release order (D. C.)

(Caption)

It appearing to the court that the costs of this suit have been paid by claimant and a good and sufficient bond furnished as provided in the judgment of condemnation, it is, this day of, 19.., ordered that the marshal of the United States deliver the seized herein to the, a body corporate, or to their agent.

.....
Associate Justice.

CHAPTER XLIX

CONFESSION OF JUDGMENT

POWER OF ATTORNEY

§§

3075 Requisites

3076 Scope, lease

3077 Jurisdiction, presumption

CONFESSION

3078 Declaration requisites

3079 Narr.

3080 Proof of execution of power
of attorney

3081 Cognovit

3082 Judgment in vacation, requi-
sites

§§

3083 Judgment in vacation, form

3084 Record, evidence

VACATING

3085 Jurisdiction, practice

3086 Special appearance and mo-
tion

DEFENSES

3087 Authority, questioning

3088 Authority, ratification

3089 Statute of limitations, plead-
ing

3090 Jury, waiver

POWER OF ATTORNEY

3075 Requisites

The authority to confess judgment without process must be clear and explicit, and it must be strictly pursued; if the power to confess judgment is lacking, the entry of judgment under such power is a nullity.¹

3076 Scope, lease

A power of attorney to confess judgment in a lease does not continue after the expiration of the lease during the period of holding over.²

3077 Jurisdiction, presumption

The authority of an attorney is presumed when the judgment is confessed in term: the authority of the attorney must affirmatively appear when the confession of judgment is in vacation.³

¹ Weber v. Powers, 213 Ill. 370, 381 (1905).

² Weber v. Powers, *supra*.

³ Martin v. Judd, 60 Ill. 78, 83 (1871).

CONFESSION

3078 Declaration requisites

The declaration upon a judgment note which is apparently barred by the statute of limitations, must affirmatively show that the particular note is not within the operation of the statute.⁴

3079 Narr. (Ill.)

(Caption)

For that whereas, the said defendant heretofore, to wit, on the .. day of, 19.., at, in the county of aforesaid, made and signed his certain promissory note, in writing, and then and there delivered the same, bearing date the same day and year aforesaid, to the said plaintiff, in and by which said note said defendant promised to pay to the said plaintiff or order dollars with interest from date for value received. By means whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay said plaintiff said sum of money mentioned in said note; and being so liable, in consideration thereof, then and there undertook and promised to pay the same to said plaintiff according to the tenor and effect, tone and intent and meaning of said note, to wit, at the place aforesaid. (Add money and other common assumpsit counts.) Yet, etc.

3080 Proof of execution of power of attorney (Ill.)

(Venue)

..... being duly sworn deposes and says that he is the subscribing witness to the foregoing warrant of attorney; that the same was executed by the said in affiant's presence on the day of the date thereof; and that the said then and there acknowledged that he executed and delivered the said warrant of attorney freely and voluntarily for the uses and purposes therein specified.

Subscribed, etc.⁵

3081 Cognovit (Ill.)

(Caption)

And the said by, his attorney, comes and defends the wrong and injury, when, etc., and says that he cannot deny the action of the said

⁴ Matzenbaugh v. Doyle, 156 Ill. 331, 334, 337 (1895).

⁵ Attach warrant or power of attorney.

nor but that the said (defendant) did undertake and promise, in manner and form as the said hath above thereof complained against him; nor but that the said hath sustained damages on occasion of the not performing of the said several promises and undertakings in the said declaration mentioned to the sum of dollars as by the said declaration is above supposed, and the sum of dollars for a reasonable attorney's fee for entering up the judgment herein over and above his other costs and charges by him about his said suit in this behalf expended. And the said hereby confesses judgment in favor of the said to the amount of dollars, including attorney's fees, aforesaid, together with costs of suit; and hereby releases all errors that may occur in the proceedings, pleading and orders which may be had in entering up judgment herein and issuing execution thereon, and consents to immediate execution upon said judgment.

.....
Attorney for defendant.

3082 Judgment in vacation, requisites

The formal recording of a judgment by confession in vacation is indispensable to the validity of the judgment and the issuance of an execution thereon.⁶

3083 Judgment in vacation, form (Ill.)

(Caption)

This day comes the said plaintiff by, his attorney, and files his declaration herein of a plea of trespass on the case upon promises. And thereupon comes the defendant by, his attorney in fact, and files his letter or warrant of attorney herein the execution whereof is duly proved, and together therewith his confession of judgment in favor of the said plaintiff for the sum of dollars.

Therefore it is considered by the court that the said plaintiff recover of the said defendant his damages of dollars in form aforesaid confessed and also his costs and charges in this behalf expended, and have immediate execution therefor.

3084 Record, evidence

The record of a judgment by confession, like all other records, cannot be contradicted by evidence *aliunde*.⁷

⁶ *Knights v. Martin*, 155 Ill. 486, 490 (1895).

⁷ *Matzenbaugh v. Doyle*, 156 Ill. 334.

VACATING

3085 Jurisdiction, practice

A judgment by confession may be set aside or execution may be stayed and the judgment ordered to stand as security by the court in which the judgment was entered to avoid resort to equity to enjoin the collection of the judgment, or to a suit at law against the attorney.⁸ If it clearly appears upon an application to set aside the judgment by confession that the plaintiff was not entitled to it, the court should vacate the judgment and leave the plaintiff to his ordinary remedy by an action; if the case is involved in doubt, or the testimony is so contradictory that the truth cannot be ascertained with reasonable certainty without an issue being formed and tried, the court should stay execution upon the judgment and permit it to stand as security until the merits of the case are fully heard and determined.⁹

3086 Special appearance and motion (Ill.)

(Caption)

And now comes the defendant,, by
....., his attorney, and enters his special appearance herein for the purpose only of moving the court to vacate and set aside the judgment rendered herein, on the ground that it is void for want of jurisdiction of this defendant, and for no other purpose.

And thereupon the defendant, by his attorney aforesaid, moves the court to vacate and set aside the pretended judgment heretofore entered herein, for the reason said pretended judgment is void as having been rendered by the court without jurisdiction of this defendant.

.....
Defendant's attorney.

DEFENSES

3087 Authority, questioning

The debtor alone has the right to question an attorney's authority to appear for him. A third party or a creditor of the debtor has no such right.¹⁰

⁸ Lyon v. Boilvin, 2 Gilm. 629, 635 (1845); Norton v. Allen, 69 Ill. 306 (1873); Hier v. Kaufman, 134 Ill. 215, 226 (1890).
⁹ Lake v. Cook, 15 Ill. 353, 356

(1854); Condon v. Besse, 86 Ill. 159, 161 (1877).

¹⁰ Martin v. Judd, 60 Ill. 84; Farwell v. Huston, 151 Ill. 239, 246 (1894).

3088 Authority, ratification

A judgment debtor has power to ratify a judgment which has been entered against him by confession without authority. The ratification of the entry of a judgment by confession by an attorney having no authority to do so is equivalent to a precedent authority and relates back to the date of the entry of the judgment.¹¹

3089 Statute of limitations, pleading

No plea of the statute of limitations is necessary in a proceeding by confession of judgment when it affirmatively appears that the debt is barred.¹²

3090 Jury, waiver

The waiver of a jury given by a power of attorney to confess judgment is exhausted by the confession of the judgment, notwithstanding its subsequent vacation. Upon setting the judgment aside, the defendant is entitled to a jury trial the same as in other cases.¹³

¹¹ Martin v. Judd, *supra*.

¹² Matzenbaugh v. Doyle, 156 Ill. 337.

¹³ Morrison H. & R. Co. v. Kirsner, 245 Ill. 431, 434 (1910).

CHAPTER L

CONSERVATOR OR COMMITTEE

| JURISDICTION | SUMMONS |
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JURISDICTION

3091 Nonresident

The county court has no jurisdiction to appoint a conservator over a nonresident feeble-minded person.¹

PETITION

3092 Illinois

State of Illinois, }
 county. } ss.

In the county court of county.

To the term, 19..

..... }
 v. } Petition for conservator.

To the honorable, judge of the said court:

The undersigned petitioners respectfully represent that they are each reputable citizens of the county of and state aforesaid; that resides in said county, Illinois, and that she, the said, is a distracted and feeble-minded person, who, by reason of unsoundness of mind, is incapable of managing and caring for her own

¹ Laird v. Dickirson, 241 Ill. 380, 383 (1909).

estate and property; that she, the said, has real property situate in the county of, and state of Illinois, known and described as follows, to wit: (Insert description) all of which real estate is reasonably worth about dollars; that the personal property of said consisting of the following, to wit, money in bank, cash in hand, and household and kitchen furniture is reasonably worth about dollars.

Your petitioners each being a sister of the said therefore pray that your honor will appoint or some other fit person, to be conservator of the said

Dated, etc.

By,
their attorney.
(Verification)

3093 Maryland

In the circuit court for county.
In the matter of }
....., } In Equity, No.
Habitual drunkard }

The petition of, adults,, an infant, years of age, by, his next friend, and, an infant, aged years, by her next friend, all of the state of Maryland, respectfully represents:

1. That your petitioners are the children of said , and reside with their said father on his farm, at or near, in said state, except, the youngest child, who resides with her aunt, in the city of

2. That much to their grief, their said father is and has been for more than a year next prior to the filing hereof an habitual drunkard, and not capable of the proper management of his estate.

3. That for a year or longer your petitioners, or some of them, have at different times considered the filing of such a petition as this to this honorable court for the purpose of preventing the waste and destruction of his estate.

4. That on or about the day of,, the said, the father of your petitioners, promised in writing, while he was under the influence of liquor, to sell to a certain, or his assigns, or the at per acre, either part or all of the farm of said, at the option of the purchaser, in or partly in or adjoining the, and adjoining the lands of; which farm is owned in fee by the said, and contains about acres of land.

5. That the deed or deeds for the same have not been executed or delivered, as far as your petitioners know.

6. That your petitioners are informed that a large part of said farm is under said agreement, or otherwise to be conveyed to the for the purpose of erecting thereon additional large and expensive buildings and to give to said a site almost unequalled for beauty and other advantages.

7. That the price agreed upon, to wit, per acre, is grossly inadequate and an evidence of the incompetency of the father of your petitioners to manage his estate.

8. That it would be for the benefit of said for this honorable court to appoint a committee or trustee for said estate and person.

Your petitioners therefore pray your honor that a commission may be issued to the sheriff of county to inquire into the question whether the said is or has been and was at the time of signing said contract an habitual drunkard.

And that they may have such other and further relief as their case may require.

And as in duty bound, etc.

.....
Petitioners.

By
their solicitors.

(Venue)

I hereby certify that before me, the subscriber, a justice of the peace of the state of Maryland, in and for personally appeared on this day of, 19.., and made oath in due form of law, that the matters and things set forth in the foregoing petition are true and bona fide as therein set forth to the best of their knowledge and belief.

.....
Justice of the Peace.

3094 West Virginia

To, clerk of the county court of county, West Virginia.

The undersigned petitioner respectfully represents that he resides in the town of, in said county; that he is a citizen of said county and state; that he is employed as a on the railroad of the railway, now operated by the company; that petitioner's father,, of and about whom he hereafter complains, is also a resident of the town of in said county and state and resides and makes his home with

this petitioner; that the said is now past years of age; that he has always been a hard working man, and has exposed himself to a great extent; that at the age above stated, he is now feeble in health and in mind seriously and dangerously impaired from the continued use of intoxicating liquors; that he is now incapable of performing or transacting any business for himself or in behalf of himself; and that he is in fact, now and has been, for more than three months past, a *non compos mentis*.

The petitioner assigns the following reasons and grounds for the charge above set forth:

1. That on or about, 19.., the said became possessed of inherited money to the amount of dollars and that all he has to show for it now is a note of dollars signed by, and dollars cash now in the hands of the petitioner, making a total of only dollars out of the dollars aforesaid; showing that within months past he has misappropriated, dissipated or has been cheated and defrauded out of the sum of dollars in cash.

2. About days ago said purchased from, of said town, a house and lot in said town for the sum of dollars in cash, which was only a fair cash value therefor, and was not in excess of its true and actual worth; but that on or about the day of, said sold said property to for the sum of only dollars, taking in payment therefor the sum of dollars in cash and a note of dollars payable one year after date without interest.

3. That immediately after said had made this sale to the said, he went to saloon in said town and deposited with him the sum of dollars in cash and said note and left the same there with him without taking any receipt therefor; but that the petitioner procured an order from the said and went to the said and upon said order he obtained said note of dollars and dollars of said cash so deposited, the said stating that between the time it had been deposited and the time of withdrawal by this petitioner, the said had obtained from him dollars in cash and owed him a whiskey bill of dollars.

4. That on the evening before the withdrawal of said note and money, the said stated to the petitioner that he had all of the dollars; but that next morning when petitioner went to get the money, the said claimed that dollars had been withdrawn in the manner aforesaid.

5. That said petitioner asked for said note and was told by his father,, that he did not know where it was, that he must have lost it; but that next morning when was asked to give petitioner said money as well as said note, not knowing positively that said had it, but believing he had, said handed said note to petitioner.

6. Petitioner further represents that said was the only heir at law of, an engineer on the railroad, who was a son of the said and a brother of this petitioner, and who departed this life on the day of, 19..; and through his death, and by being the only heir at law, the said inherited the following sums of money: (Give itemized statement) out of which sum he paid the funeral expenses of about dollars and dollars for a monument.

7. Petitioner further alleges that his said father has been almost, if not continually, intoxicated and under the influence of spirituous liquors since he came into possession of said money; that petitioner is loath and reluctant to make this statement against his father, but he deems it absolutely necessary to do so under the above existing state of affairs, and in corroboration of the petitioner's charge that the said is wholly incapable of taking care of his money or property by reason of his mind and mental condition having become impaired from the long, continued and excessive use of intoxicating liquors.

8. Petitioner further represents that the said has acted and is acting very strangely, has at times failed to recognize members of this petitioner's family, with whom he is well acquainted; and petitioner is informed that said incoherently, and seemingly without any control over himself, talks, swears and curses as he walks along the streets of the said town, charges and accuses this petitioner and others of "rolling" him, or in other words taking from him his money while he was drunk, while in truth and in fact these statements and charges are nothing more nor less than the condition of an infirm and impaired mind brought about through the excessive use of intoxicating liquors.

9. The petitioner further represents that the said according to his station and manner in which he has heretofore lived, dollars or dollars per month is sufficient to support him; but that on the contrary said has spent within the last months the sum of over per month by the purchase of liquors and through the improper, illegal and inequitable transaction before mentioned with the said

10. The petitioner therefore says, that there exists an im-

mediate necessity for the appointment of a committee, by said clerk in the recess of the county court of said county, to take charge of the small remainder of the estate and property of the said, and to take charge of the person of the said and to have his affairs properly conducted; and also for the purpose of said committee recovering money illegally taken from the said and for the purpose of canceling and setting aside all contracts made by him since he became *non compos mentis*.

The prayer of this petition, is, therefore, that the clerk of said county court do at once appoint this petitioner, or some other suitable person who will execute a sufficient bond, to take charge of the property of the said, and who will proceed to re-obtain all money illegally and improperly expended by him during the impairment of the mind of the said; and the petitioner will ever pray.

.....,
Petitioner.

.....
Attorneys.

(Venue)

..... whose name is signed to the foregoing petition, being duly sworn before me says that the facts and the allegations stated in said petition are true, except such as are therein stated to be on information and belief, and as to such allegations, he believes them to be true.

Subscribed, etc.

NOTICE

3095 West Virginia

....., W. Va.,, 19..
To
....., W. Va.

You will please take notice that on, the day of, 19.., at o'clock .. M., of that day, I will move, clerk of the county court of county, West Virginia, at his office in the court house of said county, to appoint a committee for you as provided by chapter 118, section 1, of the Code of West Virginia, 1899.

At the same time I shall file a petition setting forth the grounds upon which I rely to have such committee appointed for you.

.....

CONSENT

3096 Next Friend

I hereby authorize to use my name as next friend in above petition to the infants

.....

SUMMONS

3097 Illinois

The people of the state of Illinois, to the sheriff of said county, greeting:

We command you, that you summon if she shall be found in your county, personally to be and appear before the county court of said county on the first day of the next term thereof to be holden at the court house in the city of in said county, on the day of, 19.., then and there to show cause if any she have or can show, why this court should not appoint a conservator to manage and control her property in accordance with the petition of

And have you then and there this writ, with an endorsement thereon in what manner you have executed the same.

Witness, etc. (clerk)

MOTIONS

3098 Dismissal

State of Illinois, }
..... County. } ss.

In the county court of county.

To the term, 19...

In the matter of the petition and application of for the appointment of a conservator for

And now comes the said in her own proper person and enters her limited appearance only for the purpose of showing to the court that it has no jurisdiction in the said matter.

She shows that on the day of, 19.., she left the state of Illinois, for the purpose of joining her husband at, at which place he had a short time previously gone to take up his domicile and residence and had sent for her, and that she voluntarily left county, Illinois, and went to her said husband and to, where she has ever since resided.

That such was her residence since said day of last and before the filing of the petition in this cause, and so

will continue to be, as she left the state of Illinois with the intention of making the state of at her domicile and residence; and for that reason she was not a resident of county, Illinois, at the time of the filing of the aforesaid petition.

She therefore prays that the court will no longer take cognizance of the said matter, and she prays that same be dismissed, etc.

(Verification)

ORDERS

3099 Appointment by consent (Md.)

(Caption)

Ordered by the circuit court of county, this day of; whereas, said has appeared in person and expressed his desire to dispose with the legal proceedings under this petition, in accordance with the provisions of section 47 of article 16, of the Code of Public General Laws of Maryland, and appoints his own committee, to wit,, subject to the approbation of the court, said appointment of said committee is hereby approved and said be and he is hereby appointed a committee of said, subject to the further order of this court, upon filing, with sureties or surety, approved by the clerk of this court, a bond in the penalty of dollars, conditioned for the faithful performance of said trust.

3100 Appointment in contest (W. Va.)

(Caption)

On the day of, 19.., the petitioner filed with the clerk of this court, his petition praying for the appointment of a committee for the said, and the sheriff returned with said petition a notice served on the said of the petitioner's intention to apply for the appointment of such committee through the clerk of this court on the day of, 19..; and it appearing to the court on said last date, that said application for such committee would be resisted, the clerk of this court did not make the appointment.

Then on the day of this month, this court, through its president and a commissioner thereof, called a special session for this day, and among other things gave notice that the court would hear the application of said for the appointment of a committee for the said; and it appearing to the court that a copy of said notice for this special session held this day has been regularly posted

by the clerk of this court as provided by law, and that a copy thereof was, on the day of, regularly served upon the said, and upon the hearing of said petition and the evidence thereon adduced, the court is of the opinion that a committee should be appointed to take charge of the person and property of the said; and it further appearing to the court that, the petitioner, is a competent person to act as such committee, the court therefore orders that the said be, and he is hereby, appointed committee for the said, and the said is required to execute bond with good security in the penalty of dollars for the faithful performance of his duties hereunder.

Thereupon, the said appeared in open court and executed his bond with of as his security thereon, which bond is approved by this court and ordered to be filed by the clerk of this court and recorded.

And the said then took the oath of office before the clerk of this court as provided by law, for the faithful performance of his duties as such committee.

3101 Judgment for defendant (Ill.)

(Caption)

And now on this day of the term, the same being the day of, 19.., come attorneys for defendant, and enter special appearance of defendant,, for the purpose of pleading to the jurisdiction of the court, which said plea is placed on file and is before the court; and the petitioners by their counsel,, file a demurrer to said plea, which demurrer is overruled by the court; to which ruling, the petitioners, by their aforesaid counsel, then and there excepted and elected to stand by their demurrer. The court thereupon gave judgment in favor of the said defendant,, and against the said petitioners,, upon the said plea; and further ordered that the said petitioners pay the costs of this suit, and awarded execution to issue in default thereof; to which ruling, etc.

.....
Judge.

CHAPTER LI

CONTEMPT

REFUSAL TO PRODUCE BOOKS

§§

3102 Motion

3103 Rule to produce

3104 Order

3105 Rule to show cause

3106 Judgment

3107 Appeal bond

3108 *Mittimus*

SUPREME COURT

§§

3109 Information

3110 Motion for rule

3111 Rule to show cause

3112 Motion for writ of attachment.

REFUSAL TO PRODUCE BOOKS

3102 Motion (Ill.)

(Caption)

And now comes the plaintiff and moves the court for an order on the defendants to produce for the inspection of the plaintiff and his attorney, for the purpose of enabling them to prepare for the trial of this cause, certain books now in the possession of the defendants and containing evidence pertinent to the issues in this cause; namely, a certain book or books kept by the defendants, during the period of their dealings with and for the plaintiff, and wherein are written down statements of all the daily purchases and sales of stocks by the defendants, like those dealt in by the defendants for the plaintiff; also a certain book or books kept by defendants during the same period and wherein are written down the amount of stocks of the kind dealt in by the defendants for the plaintiff, which the defendants did carry, and were carrying, from day to day and on each day during the same period.

.....
Attorney for plaintiff.

3103 Rule to produce (Ill.)

(Caption)

On motion of said plaintiff, by his attorney, now here filed and entered, the said defendants are hereby ruled to produce before this court at the trial of said cause, to be used as evidence, for and on the part of the plaintiff, on said trial, certain books and papers, containing statements and en-

tries made by said defendants, and relating to said defendants' dealings with and for the plaintiff, and which dealings will be the subject of investigation at said trial, and which relate to the matters in controversy in said suit; said books and papers containing evidence pertinent to the issue in said cause; and which books are as follows, to wit:

1. The books and papers containing the original entries of and concerning the several purchases and sales of all the shares of stock made by said defendants for the plaintiff.

2. The books containing the journal and ledger entries of the various transactions in stocks, alleged to have been made by the defendants for the plaintiff.

3. All books and papers containing the original entries as to all moneys received and paid out by the said defendants, for and on the account of plaintiff.

3104 Order (III.)

(Caption)

This cause now coming on to be heard upon the motion of the plaintiff heretofore filed and made in this court and in this cause for the production and inspection of certain books and papers now in the possession of the defendants, containing evidence pertinent to the issues in this cause; and the court, having fully considered said motion, and the affidavits filed and read, for and against said motion, and the arguments of counsel, and being fully advised concerning the same, doth grant the said motion of the plaintiff and doth order the defendants to produce in court within days the following books and papers (Name them specifically), kept by them during the period of their dealings with and for the plaintiff, wherein are written down original statements of all the daily purchases and sales of the stocks by the defendants, like those alleged to have been dealt in by defendants for plaintiff, and also wherein are written down original statements of the amounts of stocks of the kinds alleged to have been dealt in by the defendants for the plaintiff which the defendants did carry and were carrying from day to day during the same period.

And it appearing to the court that the names of certain *bona fide* customers of the defendants, other than the plaintiff, have been in due course of business written down, and do appear upon the pages of the said books and papers, whereon said entries and statements appear, and that such names are in no wise connected with the transactions between the plaintiff and defendants, it is therefore ordered that the defendants under the direction of the of this court be at liberty to cover such names when they appear; and that thereupon the plaintiff, and his attorney, have full liberty to inspect said

entire entries and accounts, excepting the names so covered, and to take copies thereof.

And it is further ordered that such covering of names shall not include the covering of the names of the defendants' firm, or of the individual members thereof, nor the names of such members and of other persons appearing in conjunction, nor any name or names connected with any transaction in which said firm or some member thereof is interested in any other manner than as commission merchants and stock brokers; and it is ordered that such covering shall be done in such temporary manner as not to interfere with the free use of said books and papers at the trial of this cause, and the easy exposure of the covered names at such time, if the exigencies of the case shall then demand such exposure.

It is further ordered that as soon as said books and papers are produced, and the names covered under this order, the affidavit of the defendants, or any one of them, shall be filed in this cause, showing that this order has been fully complied with.

3105 Rule to show cause (Ill.)

(Caption)

It having been shown to the court that the defendants in this cause have not obeyed the order of this court for the production of certain books and papers, made and entered in this court on the day of, 19.., it is therefore now ordered that the defendants, to wit,, and each of them do appear before this court at o'clock in the morning of, 19.., and show cause why they should not be attached and punished for contempt of this court for failing to comply with the said order.

3106 Judgment (Ill.)

(Caption)

A writ of attachment having heretofore issued out of this court against the defendants for their contempt in refusing to obey the order of this court made on the day of, 19.., in a certain cause then and now pending in this court wherein is plaintiff and the said are defendants for the production by them of certain books, and the placing of them in the possession of this court for the inspection of the said plaintiff,, and his counsel, and as more fully set forth and provided in the said order, and which writ of attachment was directed to the sheriff of this county of and returnable on the day of, 19.., and the sheriff having returned that he had attached the bodies of the said

and had them in custody before the said court, and the said having appeared personally and by counsel before said court and moved the court to quash said writ of attachment and set aside said order of, which motions were denied by the court; and it appearing to the court that the said defendants have not now the custody and control of the said books mentioned in said order and are not able to comply with the same, that said defendants have not nor have any of them heretofore complied with said order but have refused and still do refuse to comply with the same; that said defendant now refuses and omits to furnish to this court any sufficient excuse or reason for his not complying with the said order; it therefore appears to the court and this court doth adjudge and find that the said defendant is guilty of the contempt alleged against him for not complying with said order of; that the said defendants are not so guilty; and that such misconduct of the said defendant is calculated to defeat, impair, impede and prejudice the rights of the above named plaintiff,

Now, it is therefore ordered that the said defendants be and they are hereby discharged, and that the said defendant be and he is hereby directed to pay the costs of these proceedings, and also to pay a fine of dollars, as punishment for his said misconduct, and to stand committed to the common jail of this county of, there to remain until said fine and the costs of these proceedings shall have been paid, unless he shall sooner be discharged by the order of this court, and that a warrant issue to carry this order into effect; from which order of the court the said defendant prays an appeal to the supreme court of Illinois, which is allowed on his filing bond in the sum of dollars, and on presenting his bill of exceptions in days.

And counsel for said plaintiff now here moves the court for an order of this court committing the said to the common jail of this county until he shall have complied with the said order of said court made on, 19., and the court doth overrule and deny the same; to which action of the court in denying said motion, the counsel for said doth except; and the said having given bond in the penal sum of dollars in compliance with the said order allowing an appeal, which bond is now approved by the court, the said is discharged from the custody of said sheriff.

3107 Appeal bond (Ill.)

¹ The condition of the above obligation is such, that whereas, the said people of the state of Illinois did, on the day of, 19.., in the court of county, in the state aforesaid, and of the term thereof 19.., recover a judgment against the above bounden for contempt for the sum of dollars, and the said to stand committed until said judgment is paid besides costs of suit; from which said judgment of the said court of county, the said has prayed for and obtained an appeal to the supreme court of said state.

Now, therefore, if the said shall duly prosecute his said appeal with effect, and moreover pay the amount of the judgment, costs, interest and damages rendered and to be rendered against him in case the said judgment shall be affirmed in said supreme court, then the above obligations to be void; otherwise to remain in full force and virtue.

(Signatures and seals)

3108 Mittimus (Ill.)

State of Illinois, }
..... county. } ss.

The people of the state of Illinois, to the sheriff of county, greeting:

Whereas, on the day of, 19.., by a certain order made in the court of county, state of Illinois, by the honorable, judge of said court, in a certain cause pending in said court, wherein plaintiff, and defendant, it was ordered that be committed to the common jail of county, Illinois, there to remain, charged with the contempt mentioned in such order until or until released by due process of law, and that a warrant for that purpose issue.

Now, we command you, that you take the body of the said and him closely and safely keep in your custody in the common jail of county until he shall have or until released by due process of law; and you are to return this writ forthwith to this court with an endorsement thereon showing in what manner you shall have executed the same.

Witness,, clerk of said court, and the seal thereof, at, in said county, this day of, 19..

Clerk.

¹ Precede this by obligation to the people.

SUPREME COURT

3109 Information (Ill.)

In the supreme court of the state of Illinois,
term, 19..

| | | |
|-------------------------------------|---|---------------------------|
| The people of the state of Illinois | } | Information for contempt. |
| v. | | |

And now come the said people of the state of Illinois, by
..... attorney general, who informs and represents to
the court that on, to wit, (Set forth the dates upon and the
facts out of which the contempt arose and the acts constituting
the contempt).

Wherefore, the said attorney general, for and on behalf of
said people, moves the court for a rule upon said
to be and appear before this court, on a day to be named, and
show cause, if any he may have, why an attachment should not
issue against him for a contempt of this court; and that he be
ordered by this court, by said day to be named, to fully and
truly answer under oath each and every of the interrogatories
filed herewith.

.....
Attorney General.

3110 Motion for rule (Ill.)

(Caption)

And now comes the attorney general and moves the court
for a rule on the defendant to appear and answer
said information and interrogatories filed herewith, and show
cause by o'clock ..M., the day of,
19.., why he should not be punished for contempt of court.

.....
Attorney General.²

3111 Rule to show cause (Ill.)

(Caption)

And now, on this day comes the attorney general of the
state of Illinois and files an information charging
with contempt of this court, and moves for a rule on him to
appear and answer said information and interrogatories filed
herewith and to show cause why he should not be punished for
contempt.

And the court having duly considered said motion, rules
requiring to appear by o'clock ..M.,
19.., and answer said information and interrogatories filed
herewith, and show cause why he should not be punished for
contempt.

² Attach suggestions and affida-
vits in support.

3112 Motion for writ of attachment (Ill.)

(Caption)

And now come the people of the state of Illinois, by the attorney general, and move the court to issue a writ of attachment in the above entitled cause against the body of the said and directed to any and all sheriffs of all counties of the state of Illinois to execute, commanding that the said be brought to the bar of this court forthwith to answer unto the information and interrogatories filed in this cause, and show cause why he should not be punished for contempt of this court, for the following reasons:

1. Pursuant to the order of this court, two copies of said order were delivered to the sheriff of county to serve, and said sheriff has faithfully and diligently attempted to serve a copy of said order entered by this court in said cause upon the said, but has failed to find said in the state of Illinois.

2. That said has knowledge that this court has been investigating his actions and doings in regard to the matters alleged in said information and is attempting to evade service of a copy of said order of said court upon him and will continue to evade service of a copy of said order so long as this court is in session, and in consequence thereof there will be a failure of justice unless said writ of attachment shall issue.

.....
Attorney General.

CHAPTER LII

CORAM NOBIS

§§

3113 Nature and scope

3114 Motion, sufficiency

§§

3115 Affidavit and counter affidavit

3116 Arrest of judgment

3113 Nature and scope

Errors of fact committed in proceedings of a court of record which are correctable at common law by writ of error *coram nobis* may be corrected, in Illinois, within five years of the rendition of final judgment in the court in which the error was committed, upon written motion and notice, the writ of error *coram nobis* having been abolished by statute.¹

The errors of fact that might be amended by motion in the nature of a writ of error *coram nobis* are those of form and not of law.²

A motion in the nature of error *coram nobis* is not allowable after the affirmance of a judgment in the appellate court.³

A motion of error *coram nobis* is the commencement of a new suit in which new issues are made up for finding and judgment and the proceeding is one at law.⁴

3114 Motion, sufficiency

The sufficiency of a motion in the nature of an error *coram nobis* must be tested in the same manner as the sufficiency of a declaration.⁵

¹ *Beaubien v. Hamilton*, 3 Scam. 213, 215 (1841); *Peak v. Shasted*, 21 Ill. 137 (1859); Sec. 67, c. 110, Rev. Stat.; Sec. 89, Practice act 1907.

² *Cook v. Wood*, 24 Ill. 295, 298 (1860); *Fix v. Quinn*, 75 Ill. 232, 234 (1874); Sec. 89, Practice act 1907 (Ill.).

³ *Mains v. Cosner*, 67 Ill. 536, 540 (1873); Sec. 89, Practice act 1907 (Ill.).

⁴ *Domitski v. American Linseed Co.*, 221 Ill. 161, 164 (1906).

⁵ *Domitski v. American Linseed Co.*, *supra*.

3115 Affidavit and counter-affidavit

A motion in the nature of an error *coram nobis* may be heard upon affidavit and counter-affidavit.⁶

3116 Arrest of judgment

The sufficiency of a motion in the nature of a writ of error *coram nobis* may be tested by motion in arrest of judgment.⁷

⁶ Domitski v. American Linseed Co., 221 Ill. 166.

⁷ Domitski v. American Linseed Co., 221 Ill. 162.

CHAPTER LIII

DEPENDENT CHILDREN

| | |
|------------------------|--------------|
| §§ | §§ |
| 3117 Petition | 3120 Verdict |
| 3118 Notice and return | 3121 Order |
| 3119 Writ | 3122 Warrant |

3117 Petition (Ill.)

State of Illinois, }
 county. } ss.

In the county court of
 county, to the term, 19.

In the matter of the petition of

to inquire into the dependency of

} Alleged dependent girl.

To the honorable, judge of the court
 of county.

Your petitioner, a responsible person and resident of said county for year ..., next preceding the time of presenting this petition, respectfully represents unto your honor:

That, a female infant of the age of years on or about 19.., now within the said county, is a dependent person in this, that she, the said infant, is without means of subsistence and has always been cared for by friends who are now very old and poor, and have lost all control of her so that she wanders through the streets; and that her parents are not supposed to be living, not having been heard from in many years and had never contributed to her support.

Your petitioner therefore humbly prays this honorable court to inquire into the alleged dependency of said female infant and of the truth of the matters herein contained in pursuance of the statute in such case made and provided, and make such order in the premises as to this honorable court may seem meet and proper; and as in duty bound your petitioner will ever pray, etc.

.....
 Petitioner.

(Venue)

..... being duly sworn, says that has read the above petition by signed, and knows the contents thereof, and that the same is true according to the best of knowledge and belief.

Subscribed, etc.

3118 Notice (Ill.)

(Caption)

To

You are hereby notified that a petition has been filed in the office of the clerk of said court setting forth that is a dependent, and a fit subject to be sent to a training school for

You are further notified that the matter of said petition will be called up before the honorable, judge of said court, for hearing, trial and such disposition as may be proper in the premises, on the day of, 19.., at the hour of o'clock, .. M., or as soon thereafter as the matter can be heard, when and where you may appear and resist the same if you see fit.

.....
Attorney for petitioner.

Return

(Venue)

..... being duly sworn upon oath says that on the day of, 19.., he served the within notice upon by delivering a true copy of said notice to said

Subscribed, etc.

3119 Writ (Ill.)

State of Illinois, }
..... county. } ss.

In the county court of county.

The people of the state of Illinois, to the sheriff of said county, greeting:

Whereas, it has been represented to the honorable, judge of this court, by in a petition duly verified, that is believed to be a dependent girl, and whereas said judge has appointed the hearing of said petition for the day of, 19.., at M.;

You are therefore hereby commanded to take said and to have her on the day of, 19.., at

M., before the county court, and then and there to await and abide the results of the trial.

And have you then and there this writ, and make due service as the law directs.

Witness,, clerk of our said court, and the seal of said court at, in said county, this day of, 19...

.....
Clerk.

3120 Verdict (Ill.)

(Venue)

We, the undersigned, jurors in the case of, who is alleged to be a dependent girl having heard the evidence in the case are satisfied that the said is a dependent girl, that her age is years and that the other material facts set forth in the petition filed herein are true.

Dated, etc.

....., Foreman,
(and five signatures)

3121 Order (Ill.)

(Caption)

On this day the matter of this petition coming on to be heard, the petitioners (the alleged dependent girl being present in court), in their own proper persons as well as by counsel,, county attorney for county, having been assigned by the court as counsel for said alleged dependent girl; whereupon, respondent moves the court to dismiss this petition for want of jurisdiction of this court, which motion having been duly considered by the court is overruled; to which ruling of the court the said respondent by her counsel doth now except.

Whereupon, come a jury of six good and lawful men as follows: (Name them); thereupon, the respondent's counsel comes and excepts to the array of six jurors and moves the court for a jury of twelve lawful men of the county; which motion is overruled by the court; to which ruling of the court in overruling the motion for a jury of twelve men the respondent's counsel doth now except.

Whereupon, the jury after being duly tried, empaneled and sworn according to law, sat together and listened to the allegations of the parties, to the testimony adduced, the arguments of counsel and to the instructions of the court, and after duly considering of their verdict in a separate room in charge of a sworn officer of the court, return into court and deliver their verdict, which is subscribed by each of them, and is in words and figures as follows: (Insert verdict).

Whereupon, the counsel for the respondent moves the court for a new trial; which motion for a new trial is now overruled by the court, and to the overruling of said motion for a new trial, the said counsel for the respondent doth now except.

It is therefore considered and ordered by the court that the said be and she is now adjudged to be a dependent girl and that she be surrendered to the care and custody of the school for girls at county, Illinois; that be appointed her guardian; and that a warrant do issue to, according to law.

To which verdict of the jury and the judgment of the court the said counsel doth now except and prays an appeal, which is allowed upon filing a good and sufficient appeal bond in the sum of dollars with a bill of exceptions within days of this date.

3122 Warrant (Ill.)

(Venue)

The people of the state of Illinois, to

You are hereby authorized to take forthwith into your charge and care, age years, who has been declared a dependent girl, and convey her to the school for girls, and of this warrant you are commanded to make due return to this court after its execution.

Witness, etc. (clerk)

(Seal)

.....

..... school for girls.

Received this day of, 19.., the girl named on this warrant.

(Seal)

....., Matron.

CHAPTER LIV

DISBARMENT

IN GENERAL

§§

- 3123 Proceeding, nature
- 3124 Grounds, former conviction
- 3125 Grounds, withholding money

PARTIES

- 3126 Relator, practice

PLEADING AND PRACTICE

- 3127 Power of court, nature
- 3128 Leave of court, motion

INFORMATION OR PETITION

- 3129 Requisites
- 3130 Information
- 3131 Petition and order

DEFENSES

§§

- 3132 Civil suit and judgment
- 3133 Motive

EVIDENCE

- 3134 Rules of evidence, sufficiency

SPECIAL COMMISSIONER

- 3135 Motion for *dedimus*, etc.
- 3136 Report
- 3137 Notice
- 3138 Objections
- 3139 Order
- 3140 Stipulation
- 3141 Motion to set date, etc.
- 3142 Motion to make rule absolute

IN GENERAL

3123 Proceeding, nature

Proceedings for disbarment are not for the adjustment of private grievances, but they are to prevent a continuation of public wrongdoing.¹

3124 Grounds, former conviction

The mere record of a conviction long anterior to the filing of an information is insufficient to disbar an attorney, but such record may be taken in connection with subsequent conduct and together they may constitute ground for disbarment.²

A judgment of conviction or acquittal upon the merits upon a trial on an indictment will ordinarily be treated as conclusive of the guilt or the innocence of an attorney at law upon a subse-

¹ *People v. Payson*, 215 Ill. 476, 487 (1905).

² *People v. Payson*, 215 Ill. 485, 486.

quent trial upon information for disbarment for the same offense.³

3125 Grounds, withholding money

An attorney at law or a solicitor in chancery cannot justify in a disbarment proceeding his retention of a client's property or money under the pretense that he is holding it as fees, when it clearly appears that the amount claimed for fees is unreasonable and extortionate.⁴

PARTIES

3126 Relator, practice

It is not necessary that the relators in an information to disbar an attorney should be the persons who were wronged by his misconduct. It is correct practice in Illinois for the attorney general to present the information upon the relation of the state's attorney and other attorneys at law.⁵

PLEADING AND PRACTICE

3127 Power of court, nature

The disbaring power of a court is not arbitrary but judicial, to be exercised with sound discretion, according to the same rules of law that govern the judicial determination of other civil rights.⁶

3128 Leave of court, motion (Ill.)

(Caption)

Now comes, state's attorney of county, relator, and moves this honorable court for leave to file the information hereto attached, and for rule on respondent to show cause within a short day to be fixed by the court why his name should not be stricken from the roll of attorneys and counselors at law of said court.

.....
State's attorney, etc.

.....
Of counsel.

³ People v. John, 212 Ill. 615, 616 (1904).

⁴ People v. Bamborough, 255 Ill. 92, 96 (1912); Sec. 7, c. 13, Hurd's Stat. 1911, p. 107.

⁵ People v. Payson, 215 Ill. 486.

⁶ People v. Amos, 246 Ill. 299, 302 (1910).

(Venue)

..... being duly sworn on oath says that he served the foregoing motion and attached information on the respondent by mailing true copies of the same, postage prepaid, addressed to him at his office at this day of, 19..

Subscribed, etc.

INFORMATION OR PETITION

3129 Requisites

An information for the disbarment of an attorney must make clear and specific charges, giving time, place and acts of misconduct with reasonable certainty, as an attorney can only be tried on the charges contained in the information.⁷

3130 Information (Ill.)

(Caption)

To the honorable judges of the supreme court of the state of Illinois, greeting:

Your relator,, in his official capacity as state's attorney in and for county, in said state of Illinois, for and on behalf of the people of the state of Illinois, and by the authority thereof, and at the relation of constituting the committee on grievances of the bar association, an organization incorporated under the laws of the state of Illinois, which has for its object, among other things, the establishment and maintenance of the honor and dignity of the profession of law and the due administration of justice in the courts of county, gives this honorable court to understand and be informed:

1. That was by this honorable court on the day of, 19.., licensed as an attorney and counselor at law, under the then existing rules of this court and the statute in such cases provided; that his name was at or about said date, entered on the roll of attorneys of this honorable court by the clerk thereof as an attorney and counselor at law; and that the said, respondent, has since said date been engaged in the practice of law in the county of, and state of Illinois, and is so engaged at the present time.

2. That on or about the day of, 19.., (Set forth all of the facts which constitute the ground of com-

⁷ People v. Matthews, 217 Ill. 94, 104 (1905); People v. Amos, *supra*; Supreme Court Rule 40 (Ill.).

plaint and disbarment, and if it consists of the failure to account for money, add) That although repeated requests and demands were made on the said, respondent, by the said and by his attorney,, the said failed and refused to account for the same, or any part thereof; but on, to wit, said day of, 19.., converted the same to his own use, contrary to his duty as attorney and counselor at law of this court.

3. That on the day of, 19.., the said, through his said attorney,, filed a complaint in writing with the committee on grievances, aforesaid, of the said bar association, charging the said with unprofessional conduct; that to said written complaint the said, respondent, filed written answers; that the evidence, proofs and argument of counsel were fully heard by said committee, the date of the last hearing by said committee of said matter being the day of, 19..; that shortly thereafter, the said was informed that the conclusion of said committee was adverse to him in said matter; that thereafter, to wit, on or about the day of, 19.., the said made a settlement of said matter with the said and paid to the said for the said the sum of dollars in full satisfaction of the said claim of the said, and the said, through his said attorney,, accepted said sum of money as such full satisfaction.

But, your relator claims that the said settlement is neither excuse nor palliation of the offenses of the respondent hereinbefore alleged; that the foregoing actions of the said respondent are, and each of them is, unprofessional, dishonorable, and criminal.

For which reasons your relator respectfully submits that the license of the said, respondent, as attorney and counselor at law, aforesaid, should be revoked and canceled; that the name of the said should be stricken from the roll of attorneys of this honorable court; and that he should no longer be allowed to occupy or exercise the profession of attorney and counselor at law in the state of Illinois.

And your relator therefore prays that a rule issue out of this court, returnable at a short day, or at the next term thereof, requesting the said, respondent to show cause why his name should not be stricken from the roll of attorneys upon the information heretofore set out; and to that end that he answer this information; and on failure of said respondent to show cause, that an order be entered herein, revoking and canceling the license issued to him as such attorney and coun-

selor at law of this court; and that such further and other orders be entered herein as to your honors shall seem meet.

.....
State's attorney, etc.

(Verification)

3131 Petition (Mich.)

State of Michigan.

In the court for the county of
In the matter of }
....., } Misc. No.
an attorney at law.

To the honorable the court for the county of

.....
Your petitioners, and, heretofore duly appointed friends of this court by the honorable the judges of this court and acting under the authority and direction of this court and upon the authority of and in accordance with the terms of a certain order hereinbefore made by this court and duly filed in this cause, directing them to make, prefer, present and prosecute charges against the above named, in accordance with the recommendation of the executive committee of the bar association, as incorporated in certain resolutions adopted by said executive committee, a duly certified copy of which is filed in this cause, which resolutions are expressly made a part of this petition, do hereby complain of the said and show unto this honorable court, on information and belief as follows:

1. Your petitioners are attorneys at law and solicitors in chancery residing in the city of, county of, state of Michigan, and duly admitted to the practice of law in all the courts of this state.

2. The said is an attorney at law and solicitor in chancery, residing in the city of, county of and state of Michigan, and duly admitted to practice in all the courts of this state.

3., an inhabitant of the city of, in said state and county, died testate in the said city of, on or about the day of, 19.., owning and possessed of and leaving large estate, both real and personal, within said county to be administered. He left a last will and testament by which he devised his estate to his widow,, and his daughters, (who later married one and is hereinafter referred to as), and (who later married one and is hereinafter referred to as), the shares of the daughters to be held in trust by his executor, whom he also appointed trustee, to pay the daughters the net income or so much thereof as might be necessary for their support. If the income should not be suf-

ficient for this purpose, the will authorized his trustee to use so much of the principal as might be necessary therefor. In case of the death of either daughter without issue, her share of the estate was to be divided between the other two devisees above referred to. In case of the death of a daughter with issue, her share was to be given to such issue. In case of death of a surviving daughter without issue, after taking under the former provisions of the will, her share was to be divided between the brothers and sister of the testator, named in the will. died without issue after the making of such will, to wit, on or about the day of, 19..

The said, of said city of, who was not a residuary legatee under said will, was named by the testator in his said will as executor of such will and testament and trustee thereunder and was therein authorized by the testator to sell or lease the testator's property as he, said, deemed proper and to invest the moneys of the estate as he deemed best.

The said will was executed the day of, 19.., the testator died on or about the day of, 19.., a petition for probate of the will was duly filed the day of, 19.., the said will, wherein said was appointed executor, was in and by said probate court duly admitted to probate the day of, 19.., and the said, who was legally competent, accepted the trust as executor under such will and duly filed his proper bond as executor, as ordered by said probate court and as required by law, which bond was duly approved by said probate court on the day of, 19.., and letters testamentary on such will were duly issued to him by the said probate court for said county of on said day of, 19.., and he then and there entered upon his trust as executor and as trustee under said will, and immediately after said day of, 19.., and before the day of, 19.., he, the said, both as such executor and as such trustee, came into possession, and on the day of, 19.., was in possession of large amounts of goods, chattels, rights, credits and estate of the said, deceased, and both as such executor and as such trustee had, by said day of, 19.., made large disbursements therefrom.

Under the conditions of his said bond, and by law and by a lawful order duly made by said probate court, said executor was required, and it was his duty to make and return to said probate court within three months from the date of such bond, to wit, from the day of, 19.., a true and perfect account of all the goods, chattels, rights, credits and estate of the said deceased, which came into his possession or knowledge, or to the possession or knowledge of any other

person for him; and to administer according to law and to the will of the testator all such goods, chattels, rights, credits and estate, and out of the same to pay and discharge all debts, legacies and charges, chargeable on the same, or such dividends thereon as should be ordered and decreed by the said probate court; and to render a true and just account of his administration of such estate to the said probate court within one year from the date of his said bond, and at any other time when required by said court; and to perform all orders and decrees of the said probate court by him, the said executor, to be performed in the premises. No extension of time for the performance of any of these duties was ever granted to the said or prayed for by him.

Commissioners on claims, so-called, were duly appointed by the probate court and filed their report in said court on the day of, 19.., in which they stated that no claims had been presented against said estate.

The said did not within the time mentioned in his bond, nor up to and including the day of, 19.., make and return to or file in or with the said probate court any inventory or account of the goods, chattels, rights, credits or estate of said deceased, or any account as required by law, and on said day of, 19.., an order was duly made and entered by and in said probate court ordering and requiring him to file in such probate court a true and perfect inventory of said estate and also to render to said court his, the said 's, final account as such executor within thirty days after service upon him of a copy of such order. No appeal has ever been taken from said order. Said order was duly served upon the said on the day of, 19.., by the delivery to him, the said, of a true copy thereof, as appears by the files and records of said court. This order the said utterly and entirely failed and neglected to obey or perform or comply with. Up to and including the day of, 19.., the said failed and neglected to make and return to said probate court any such inventory, or any such account or any account whatsoever, and failed to render to said probate court any account of his administration of said estate.

On said day of, 19.., the said was in person present in said probate court and, the said being then so in such court, an order was duly made and entered by said probate court in open court that the said, executor, file in said court on or before the day of next, to wit, on or before the day of, 19.., a true and perfect inventory of all the estate, real and personal, of said deceased,, that had come into his, the said 's, possession or knowledge as such executor, and render an account to said probate court of

his receipts and disbursements as such executor, together with a statement of the investment of the funds of said estate at the time of such order. No appeal has ever been taken from said order; but, although said was in said probate court when such order was made and was fully acquainted with the fact of such order and with the contents thereof and the duty thereby imposed upon him, he utterly and entirely failed and neglected to obey, perform, or comply with the same, and did not make and return to or file in or with said court any inventory of such estate, and did not render to said court any such account or any such statement, or any account or statement whatsoever in said estate until after the day of, 19.., on which last mentioned date a warrant was issued by and out of said probate court for his arrest and imprisonment for his failure to obey, perform and comply with such order, and he continued to so fail, neglect and refuse to obey, perform or comply with such order, and filed no such inventory, account or statement, nor any account or statement whatsoever in said estate until after his removal from his office as such executor, to wit, until the day of, 19..

On the day of, 19.., a petition was duly presented to and filed in and with said probate court by the said, a person interested in said estate, praying for the removal of the said executor for his failure to file such inventory and accounts, and for other reasons set forth in such petition, on file in said probate court. Said probate court ordered that said petition be heard therein on the day of, 19.., and cited and required the said to be and appear at said probate court, in the probate court room in the city of, on said day of, 19.., at ten o'clock in the forenoon and then and there to show cause, if any, why said prayer of said petition should not be granted. Due and proper notice of the filing of such petition and of the hearing thereof and of the time and place of such hearing and of the said citation to and requirement of the said, as aforesaid, was given to the said and the said duly accepted service of such notice, as appears from the files and records of said probate court. On the said day of, 19.., the said petition came on to be heard and was heard in said probate court and; after full hearing and examination into the same and into the allegations thereof, the said court, by an order then and there and therein made and entered, found and determined that due notice had been given to the said of the filing of said petition and of the hearing thereof, and that the said had failed to file an inventory of such estate and to render his account according to law, and had failed to perform the decree of said court requiring him to file

his account, and that he was unsuitable to discharge his trust as such executor, and ordered that the said be and he thereby was removed from his said office as executor of said estate.

On the day of, 19.., a petition praying for the appointment of, of said city of, as administrator *de bonis non* with the will annexed of said estate was duly presented to and filed with said probate court by the said, and the said probate court ordered that said petition be heard therein on the day of, 19.., at ten o'clock in the forenoon, and that a copy of said order be published three successive weeks previous to said time of hearing in the, a newspaper published and circulating in said county of Due notice of the filing of said petition and of the date and place of such hearing was given as required by law, and a copy of said order of said probate court was duly published as in said order required; and on the day of, 19.., the said petition came on to be heard and was heard in said probate court and, after full hearing and examination into the same and into the allegations thereof, the said, who was legally competent, was by said court duly appointed such administrator *de bonis non* with the will annexed of said estate, and his bond as such administrator was by said court fixed at dollars, which said trust was accepted by the said, and which said bond was later, to wit, on the day of, 19.., duly filed as ordered by said probate court and was duly approved by said probate court, and letters of administration *de bonis non* with the will annexed of said estate were then and there, on the said day of, 19.., duly and properly issued out of and by said court to the said, who thereupon entered upon the execution of his said trust.

On the day of, 19.., the said filed in the said probate court an inventory of the said estate, which is the only inventory of said estate ever filed by him and which he, the said, stated under oath, the day of, 19.., was a true and perfect inventory of all the estate of the said, deceased, that had come into his, the said 's, knowledge or possession. This inventory showed receipt by the said, as such executor, of property, real and personal, listed in such inventory at dollars and cents (\$.....); also an undivided interest in certain syndicates on which the testator held notes and claims aggregating upwards of dollars (\$.....); and also certain stocks stated by said in said inventory to be of no value.

On the said day of, 19.., the said also filed in the said probate court an account which he stated

under oath, the day of, 19.., was an account of his receipts from said estate and disbursements therefrom as such executor from the date of his appointment, to wit, from the day of, 19.., to the day of, 19..

The filing of this inventory and account, over a month after his removal as executor and years and months after he had qualified as executor under the said will, and not until orders for the filing of the same had twice been made and disobeyed and a warrant issued for his arrest, was the first step taken by the said in the probate court as executor of said will and testament after the filing of his bond as executor; and, as your petitioners are informed and believe and charge, was the first accounting of any kind made, and the first means given by the said for an investigation by those interested in his handling of the large sums which had come into his hands under the said will during the years and more in which he had full control of the said estate.

On the day of, 19.., the said and the said, devisees *cestuis que trust* under the said will, and said were all represented in the said probate court by their respective attorneys, and an order was then and there duly made and entered by and in the said probate court that the said file forthwith in said probate court a bond in the penal sum of dollars as testamentary trustee under the said will, and a true copy of said order was duly served on the said, at the city of, in said county of, on the day of, 19.., by the delivery, then and there, to the said in person of such true copy of said order. The said, as such trustee, had come into possession of, and when such order was made and on said day of, 19.., was in possession of large amounts of property under said last will and testament; but the said last mentioned order was not complied with and no bond has ever been filed by or for the said as such trustee, and the said has failed to qualify as such trustee.

On the day of, 19.., a petition was presented and filed in the said probate court, by the said, setting forth, among other things, the removal of the said from his said office as executor of said last will and testament, and the fact that he had never qualified as trustee under said will, as above set forth; and also that there were and are certain trusts in said estate, wherein said petitioner was and is interested as one of the *cestuis que trust*, still to be executed; and that the said was and is an unfit person to be appointed trustee; and praying that the company, of, Michigan, be appointed as trustee under

said will. The said probate court ordered that the day of, 19.., at ten o'clock in the forenoon, at the probate court room in said city of, be appointed for the hearing of said petition, and that a copy of said order be published three successive weeks previous to said time of hearing in the, a newspaper published and circulating in said county of, Due notice of the said filing and of the date and place of such hearing of said petition was given as required by law, and a copy of said order was duly published as in said order required. On the day of, 19.., the said petition came on to be heard, and was heard, in said probate court and, after full hearing and examination into the same, said company, which was legally competent, was by said probate court duly appointed such trustee under said will and testament and its said bond as such trustee fixed at dollars. Said company accepted such trust and said bond was duly filed in and with and approved by said probate court on the day of, 19.., and proper letters of trusteeship were then and there duly issued out of and by said probate court to said company, giving said company full power and authority to manage and dispose of according to law and said will, all real and personal estate belonging to said company as such trustee, and said company then and there entered upon and is now engaged in the execution of such trust.

4. In said account of the said as executor, filed in said probate court as aforesaid, which said exhibit, the said stated under oath, the day of, 19.., as hereinabove set forth, contains a true and correct statement of all the disbursements of the said as such executor and trustee during the period from the day of, 19.., to the day of, 19.., the said credits himself and charges said estate as follows, to wit:

....., paid commission on sale of lot (Describe same); and the said, by his said account, and by testimony given by him on the examination thereof, intentionally, knowingly and wilfully made it to appear and represented to the said probate court and to the persons interested in said estate that on the day of, 19.., he had rightfully paid to some person other than himself, out of the moneys received by him as such executor as aforesaid and belonging to said estate, the sum of dollars (\$.....) as a commission for and on account of the sale of certain property located at number avenue in the city of, county of, and known as lot number of subdivision, which is the property mentioned and referred to in the said item of his said account last above referred to, and

which was then and there part of the assets of the estate of the said, deceased.

Whereas, your petitioners charge and allege that the said did, as such executor and for and on behalf of said estate, sell the said property and did not pay any commission on said sale, or by reason thereof, to any person whomsoever, nor had he, as such executor or trustee, any right to pay, or himself to retain, any commission whatsoever on the said sale or by reason thereof, as he, the said, then and there well knew.

(Proceed, in the same manner, with other specific violations of duty)

19. The acts and conduct of the said hereinbefore set forth are unprofessional and contrary to law and good morals, and show that the said is unfit to be trusted with the powers of an attorney and is unworthy to act as an attorney and counselor at law and solicitor in chancery in the courts of this state; that his license to practice as an attorney and counselor at law and solicitor in chancery should be canceled and revoked, and that he should be removed from his said office and his name stricken from the list of attorneys of this court and of all other courts in this state.

20. Your petitioners state and charge as follows:

1. The said, as an attorney at law and as executor and trustee of and under the last will and testament of, deceased, has been and is guilty of wilful and unlawful and grossly immoral and unprofessional misconduct in that: (a) He wilfully and knowingly and unlawfully failed and neglected to file in the probate court for the county of, within the time required by law and by the conditions of his bond as such executor and by an order duly and lawfully made by said probate court, any account, or inventory so-called, of the estate real or personal belonging to the estate of the said, deceased, which, of great value, had within that time come into his, said 's, possession as such executor; and he wilfully and knowingly and unlawfully so continued in his said failure and neglect for years after he had been appointed and qualified as such executor, as is hereinabove, in paragraph numbered hereof, also set forth. (b) He wilfully, knowingly, fraudulently and unlawfully, in and by his said account as such executor and in and by his testimony given in said probate court on the examination thereof, sought and attempted to deceive and mislead said probate court and to deceive and mislead and cheat and defraud the persons interested in said estate, by falsely charging in said account and claiming in his said testimony, as disbursements made by him as such executor from the funds of said estate and for which he sought credit to himself, certain payments as commissions on the sales of certain properties

called in such account lot number, subdivision; which alleged payments aggregated dollars (\$.....); and, as he, the said, well knew, neither of which alleged payments was ever made, as is hereinabove, in paragraph numbered, set forth. (Summarize other charges in the same way)

2. The said has been and is guilty of immoralities which utterly unfit him for the faithful discharge of the duties of an attorney to his clients and to the courts in which he may practice, and his character can no longer be approved by this court or any other courts, and neither litigants, nor the public, nor the courts may safely rely upon his honor and integrity.

Your petitioners therefore pray that an order be entered herein by this court and on the records of this court finding the said guilty of any or all of the charges hereinabove preferred, and revoking and canceling his license to practice as an attorney and counselor at law and solicitor in chancery in the courts of this state, and removing him from his said office and offices, and striking his name from the roll of attorneys of this court, and disbarring him from practicing in any of the courts of this state.

To the end that a full and fair opportunity may be given to the said to answer the aforesaid charges and show cause, if any there be, why such an order as herein prayed for should not be made, may it please the court to grant an order directing the said, by a day certain, to be named therein, to answer said charges and the matters hereinabove set forth, paragraph by paragraph, and to serve a copy of his said answer upon, one of your petitioners, and on a day certain, to be also named in said order, to be and appear before this court and answer said charges and show cause, if any there be, why an order should not be granted and entered herein in accordance with the prayer of this petition.

.....
Friends of the court, appointed by the
..... court for the county of.....

.....
Business address.

(Venue)

On this day of, 19..., before me, the undersigned, a notary public, in and for said county of, personally appeared and, to me known to be the same persons named in and who, as friends of the court, signed the foregoing petition and charges, and made oath that the statements, allegations and charges in said petition contained are true to the best of their knowledge, in-

formation and belief and to the best of the knowledge, information and belief of each of them, and that the said is guilty of the various charges therein alleged as they and each of them verily believe.

.....
Notary Public, etc.

Order

(Caption)

On reading and filing the petition of and, heretofore duly appointed as friends of this court and duly authorized and directed by this court to make, prefer, present and prosecute charges against said, an attorney at law, practicing before this court, in accordance with the recommendations of the executive committee of the bar association, a certified copy of which is on file in this cause; and it appearing that the charges therein made should be prosecuted; and in order that a full and fair opportunity may be granted to said to answer the said charges and to show cause, if any there be, why an order should not be entered in accordance with the prayer of said petition;

It is hereby ordered that a true copy of said petition, containing said charges, and a true copy of this order shall be forthwith delivered to the said by the clerk of this court; and that said do answer said charges and the allegations in said petition set forth, paragraph by paragraph; and that he serve a true copy of his said answer upon said, on or before the day of, 19...; and that said be and appear before this court, at the court room in the city of, on the day of, 19..., at o'clock in the forenoon, or as soon thereafter as he may be heard, and show cause, if any there be, why an order should not be entered herein revoking and canceling his license to practice as an attorney at law and solicitor in chancery in the courts of this state, and striking his name from the roll of attorneys of this court, and disbaring him from the practicing in any of the courts of this state, in accordance with the prayer of said petition.

.....
Presiding Circuit Judge.

DEFENSES

3132 Civil suit and judgment

The recovery of a judgment for the amount collected and unlawfully withheld, which amount is made the ground for

disbarment, is no defense to a disbarment proceeding, for the reason that in a civil suit for the amount collected no moral turpitude is involved, whereas in a disbarment proceeding it is otherwise.⁸

3133 Motive

It is no defense to a proceeding for disbarment that the persons who are active in the prosecution of the cause are animated by personal spite and a desire for revenge against respondents.⁹

EVIDENCE

3134 Rules of evidence, sufficiency

The recognized rules of evidence must be observed upon hearing of an information for disbarment;¹⁰ and to justify the disbarment of an attorney, the evidence must be clear and free from doubt as to the act charged, and its motive.¹¹

SPECIAL COMMISSIONER

3135 Motion for *dedimus*, etc.

(Caption)

Now comes, state's attorney of county, relator, by his attorney,, and moves this honorable court for the appointment of a special commissioner at, to take the testimony and report to the supreme court his findings of law and fact in the above entitled matter.

And he further moves for an order in said cause limiting the time of the taking of proofs on behalf of the relator to days from the date of the entry of such an order, and on behalf of the respondent to days, and giving relator days for rebuttal.

And he further moves for the issuance of a *dedimus potestatem* directed to, notary public, or any other notary public in in case of failure, inability or refusal of said to act, to take the depositions of, and other witnesses on oral interrogatories, and directing that said depositions be taken at a time subsequent to the closing of all proofs before the special commissioner in

⁸ People v. Allen, 244 Ill. 393, 400 (1910).

⁹ People v. Payson, 215 Ill. 487.

¹⁰ People v. Amos, 246 Ill. 303.

¹¹ People v. Silha, 252 Ill. 385, 392 (1911).

..... and upon days' notice to respondent; that upon their return to the clerk of this court, he shall file and open said depositions and immediately forward them to the special commissioner in for his consideration in making his findings in said matter, giving respondent leave to submit proofs before said special commissioner in reply to said depositions.

And in support of said last mentioned motion, your relator suggests that the witnesses upon whose evidence the relator expects to rely to establish the count in said information charging unprofessional conduct by the respondent are residents of; that it is necessary to take the evidence of said witnesses in said matter; that some of said witnesses are now in, but are expected to return to on or about, 19..

By
his attorney.

(Venue)

....., being first duly sworn, on oath says that he has read the foregoing suggestions and that the same are true in substance and in fact.

Subscribed, etc.

3136 Report

(Caption)

To the honorable, the chief justice and the associate justices of the supreme court of the state of Illinois.

The undersigned, as special commissioner of this court, appointed by an order entered on, 19.., in the above entitled cause, to take the proofs in said cause and to report to the court the conclusions of law and fact thereon, begs leave to report:

That pursuant to said order of reference and to due notice given, I was attended at my office, room, Illinois, by, attorney for relator, and by the respondent and attorneys for respondent, on the day of, 19.., and on subsequent days to which the taking of evidence was from time to time adjourned, until the completion of the taking of proofs.

..... were examined as witnesses on behalf of the relator, and the respondent testified in his own behalf. All of said witnesses were respectively duly sworn prior to testifying. Their testimony and all of the proceedings upon the hearing of said cause were taken down in shorthand by a court reporter and thereafter transcribed under my supervision, the transcript of which I herewith return.

That pursuant to the order of court entered, 19.., I have in addition to the testimony of the above mentioned witnesses, read and considered the deposition of in making up and reporting my conclusion herein: which deposition is also herewith returned. I have likewise considered various items of documentary evidence introduced in evidence upon the hearing of said cause, which documents were marked as exhibits, are properly referred to in the transcript herein-above mentioned.

That the evidence on both sides having been closed, counsel for the parties submitted to me briefs and arguments upon the facts and the law; that the same having been carefully considered by me, I now respectfully report my conclusions of fact and law as follows: (Set forth conclusions of fact and law as in a master's report).

I conclude that the respondent's conduct in his dealings with, was unbecoming a member of the legal profession.

All of which is respectfully submitted.

Dated, etc.

.
Special commissioner of the supreme
court of Illinois.

3137 Notice

(Caption)

To

Attorneys for parties herein.

Please take notice that the draft of my report in the above entitled cause may be inspected at my office and that objections thereto may be filed at or before, 19.., at o'clock .. M., at which time I shall hear arguments on objections filed.

Dated, etc.

.
Special commissioner, etc.

Received copy, etc.

3138 Objections

(Caption)

Now comes, respondent, by his attorney,, and to the report of the honorable, special commissioner of said court, makes the following objections:

1. Because said special commissioner has failed to find (Set forth ground of objection, and all other objections in the same manner).

In all of which particulars the respondent objects to the said

report, and submits that the same ought to be varied and altered.

.....
By
his attorney.

3139 Order

(Caption)

To the honorable, the chief justice and the associate justices of the supreme court of the state of Illinois.

I have carefully considered the above and foregoing objections of the respondent, numbered from to, both inclusive. I have sustained the objection and have accordingly modified the finding to which it refers by inserting the words ".....," in the line from the bottom on page of my report. I have also sustained, in part, the objection, and have accordingly modified the finding to which it refers by inserting the words ".....," in the line of page of my report.

I found no reason to modify my report in any other respect and have therefore overruled all other objections of the respondent.

Dated, etc.

3140 Stipulation

(Caption)

It is hereby stipulated that the above and foregoing objections shall stand as exceptions.

3141 Motion to set date, etc.

(Caption)

Now comes the relator by his attorney,, and moves for an order herein fixing the time for the filing of evidence, abstracts and briefs by the respective parties; and in support of said motion suggests:

That the report of the special commissioner, honorable, to whom said cause was referred has been filed herein; that no objections or exceptions have been filed by the relator to said report; that the respondent has filed objections to said report, which have, by stipulation, been made exceptions in this court; and that said cause is now ready for hearing on the report of said special commissioner.

3142 Motion to make rule absolute

(Caption)

Now comes the relator,, state's attorney of
 county, by his attorney,, and moves
 the court to make absolute the rule to show cause entered
 herein at the term and returnable on the
 day of term, 19.., of this court, for failure of the
 respondent to comply with said rule.

.....¹²

¹² Attach notice of motion and
 proof of service.

CHAPTER LV

DISTRESS FOR RENT

| | |
|---|---|
| <p style="text-align: center;">IN GENERAL</p> <p>§§</p> <p>3143 Proceeding, nature and scope</p> <p>3144 Cause of action, rent</p> <p style="text-align: center;">AFFIDAVIT</p> <p>3145 Florida</p> <p>3146 Virginia, city tenancy</p> <p>3147 Virginia, farm tenancy</p> <p style="text-align: center;">WARRANT OR WRIT</p> <p>3148 Florida</p> <p>3149 Illinois; writ, nature</p> | <p>§§</p> <p>3150 Illinois, writ</p> <p>3151 Virginia</p> <p style="text-align: center;">FORTHCOMING BOND</p> <p>3152 Florida</p> <p>3153 Virginia, affidavit in lieu of bond</p> <p style="text-align: center;">DECLARATION</p> <p>3154 Amendment, practice</p> <p style="text-align: center;">DEFENSES</p> <p>3154a Set-off</p> |
|---|---|

IN GENERAL

3143 Proceeding, nature and scope

In an action or proceeding of distress for rent, the proper subject matter of the controversy is the rent alone, unless the defendant interposes a set-off.¹

3144 Cause of action, rent

At common law distress cannot be levied for anything other than rent. In so far as Illinois statute relates to the claim for which the warrant may issue, it is a re-enactment of what was the common law, and requires the claim to be for rent due, and for nothing else.² To confer the right upon the landlord to distrain there must be due and unpaid the entire amount of rent, or some portion thereof.³

¹ Cox v. Jordan, 86 Ill. 560, 564 (1877).

² Bates v. Hallinan, 220 Ill. 21, 25 (1906).

³ Lindley v. Miller, 67 Ill. 244, 248 (1873).

AFFIDAVIT

3145 Florida

(Venue)

Before me, the undersigned authority, personally appeared and, who being duly sworn, severally say that they are the executors of the last will and testament of deceased, late of said county and state, and that was and still is indebted to said and as executors as aforesaid, in the sum of dollars for rent and use of all that parcel of land situate, lying and being in the county of and state of Florida, and more particularly described as follows, to wit: (Give legal description) together with the buildings and improvements, from the day of, 19.., to the day of, 19.., which said rent is payable in money.

Sworn and subscribed, etc.

3146 Virginia, city tenancy

M.....

19.. To Dr.

For rent of premises in corporation (city), as follows, to wit:

.....

City of to wit:

I,, the person claiming the rent above mentioned, maketh oath and saith that the above sum of dollars, as he verily believes, is justly due to said for rent reserved upon contract from the said

Sworn to, in the city of on the day of, 19.., before me, a justice of the peace for said city.
, J. P.

3147 Virginia, farm tenancy

(Venue)

This day personally appeared before me, a in and for the county aforesaid, in the state of Virginia, (or "....., agent for"), and made oath that there is now justly due to him (or "to the said"), from, the sum of dollars and cents, with interest thereon from the day of, 19.., and that the same is for advances made under contract to the said, a tenant cultivating

the lands of said (or "a laborer working the lands of said").

Given under my hand this day of, 19..

Claim not due

(Venue)

This day personally appeared before me, a in and for the county aforesaid, in the state of Virginia, (or "....., agent for"), and made oath that there is justly owing to him (or "to the said") from, the sum of dollars and cents, which amount is for advances made by him under contract to the said, a tenant cultivating the lands of said (or "laborer working the lands of said"), which said amount will be payable on the day of, 19.., and that said intends to remove or is removing from such lands the crops, or his portion of the crops or share therein, so that there will not be left enough to satisfy the said claim of the said

Given under my hand this day of, 19..⁴

WARRANT OR WRIT

3148 Florida

(Caption)

Whereas, and have this day made oath before me that they are the executors of the last will and testament of, deceased, late of county, Florida, and that one was and still is indebted to them as executors of aforesaid in the sum of dollars for the rent and use of all of that parcel of land lying and being in the of the county of and state of Florida, and more particularly described as follows: (Describe property) together with the buildings and improvements thereon, from the day of, 19.., to the day of, 19.., which said rent is payable in money;

Therefore, you are hereby commanded to levy upon the property of said that may be liable for rent, and collect the sum of dollars, together with costs.

And you are further commanded to summon said personally to be and appear before the judge of our circuit court for county, judicial circuit of Florida, at the court house in the of, on the day of, 19.., to answer the complaint of

⁴ Sec. 2496, Va. Code Ann.

and as executors of the last will and testament of, deceased.

Herein fail not, or judgment will be given against him by default.

Given under, etc.

3149 Illinois; writ, nature

In Illinois, the writ stands as process and as a pleading in the place of a declaration and is demurrable.⁵

3150 Illinois, writ

(Venue)

To the sheriff of said county, greeting:

Whereas,, of said county, on the day of, 19.., made his instrument in writing commonly called a lease, whereby the undersigned,, leased to said certain real estate in said lease described, a copy of which lease is hereto attached as exhibit "A," and made a part hereof.

And whereas, the said entered into possession of the real estate described in said lease, on the day of, 19.., under said lease and is still in possession of said real estate.

And whereas, it is provided in said lease, among other things, that the said should pay as rent for said premises of all corn and grain raised on the premises, to be delivered at, meaning in said county, at the option of; small grain to be threshed and delivered by, 19..; and corn to be gathered by, 19.., and to be delivered by, 19..;

And whereas, said rent corn has neither been gathered nor delivered by the said; whereby and by means whereof and by force of the statute in such case made and provided, the of said corn to be delivered by, 19.., of the value of dollars, has become due and payable to the undersigned.

Wherefore, you are hereby authorized to distrain the goods and chattels of the said, which are liable to be distrained wherever they may be found in the said county of, where the said resides, for the sum of dollars, being the amount due on the day of, 19.., under the terms of said lease, for rent of the following described premises in said county mentioned in said lease, to wit: (Give legal description) in the county of and state of Illinois; and for so doing, this shall be your sufficient warrant.

Given under my hand and seal this, etc.

(Seal)

⁵ Bates v. Hallinan, 220 Ill. 23, 25.

Return

An inventory of the several goods and chattels of,
distrained by me,, sheriff of county aforesaid
on the day of, 19.., in the said county of
....., where the said resides, by virtue of the
warrant and authority and in behalf of, the
landlord, for the sum of dollars, being the amount of
rent due to the said landlord on the day of,
19.., for the premises in the warrant mentioned, to wit: (Give
itemized list).

....., Sheriff.

b

(Venue)

To, or any sheriff or constable of
county, greeting:

You are hereby authorized and required to distrain the goods
and chattels of, of, liable to be
distrained, wherever found in said county of, to
make the sum of dollars rent, now due me for
....., known and described as, situated in
said city of, being balance of rent due me therefor for
the months of, according to the terms and covenants
of a certain lease executed by me as owner of said premises, to
one,, 19.., for the term ending,
19.., at a rental of per month, which lease is still in
force, and afterwards assigned in writing with my consent to
said, and under which lease and the assignment
thereof, you, the said on the day of,
19.., accepted said lease and entered into the possession of
said, and have continued to be in possession of the
same hitherto; and make due return of this warrant to the
..... court of county, as the law directs; and this
shall be your sufficient warrant for your so doing.

Dated, etc.

.....
Landlord.

Return

An inventory of the several goods and chattels of,
distrained by me, on the day of, 19.., in the
county of, where the said resides,
by virtue of the warrant and authority, and in behalf of,
the landlord, for the sum of dollars, being the amount
of rent due to the said landlord on the day of,
19.., for the premises in the warrant mentioned, to wit:

List of Property Distrained

(Describe property)

3151 Virginia

To the high constable of city of:

Upon the affidavit of, the person claiming the rent above mentioned, that the amount of dollars, as he verily believes, is justly due to the said, for rent reserved upon contract from, this warrant is issued by me in the name of the commonwealth. You are hereby required to distrain for the said rent of, dollars, and cost, according to law.

Given under my hand and seal this day of, 19..
....., J. P. (Seal)

By virtue of the within
distress warrant levied on
the day of,
19.., on the following
property, found in the
within named premises, or
removed therefrom not
more than thirty days, to
wit:

..... D. D.
..... H. C. C. R.
For

FORTHCOMING BOND**3152 Florida**

⁶ The condition of the above obligation is such, that whereas said and as executors afore-
said, have this day sued out a distress warrant to collect the sum of dollars claimed to be due to them from said, for the rent of certain premises in said warrant described, which said warrant has been levied upon the following property belonging to said now on the said premises, to wit: (Describe property).

Now, therefore, if the said shall well and truly pay the amount of the rent which upon the trial may be found to be due by him to the said and as executors, for the said premises, then this obligation to be void; else to remain in full force and virtue.

(Signatures and seals)

(Venue)

On this day of, 19.., personally appeared, being duly sworn severally say that they are

⁶ Precede this by usual obligation.

worth dollars over and above all of their debts and liabilities.

Sworn, etc.

3153 Virginia, affidavit in lieu of bond

(Caption)

This day personally appeared before me, the undersigned, a, in and for the county aforesaid, in the state of Virginia, who made oath before me in my said county that he is the tenant in the proceedings aforesaid, whose property has been levied on by virtue thereof, and that he is unable to give the bond required by section 3617 of the Code of Virginia, and that he has a valid defense to said proceedings under section 3621 of the Code of Virginia.

Given, etc.⁷

DECLARATION

3154 Amendment, practice

The plaintiff cannot so amend his declaration, in a proceeding by distress for rent, as to make it include claims that are not for rent where the defendant has pleaded a set-off, but the claims which arise from other obligations than for rent must be made the subject of a reply to the defendant's set-off.⁸

DEFENSES

3154a Set-off

A claim against the plaintiff or the landlord could not, at common law, be set off in an action of distress for rent.⁹ Set-off is appropriate under Illinois statute;¹⁰ and the plaintiff may reply set-off against the defendant's set-off the same as in other actions.¹¹

⁷ Sec. 3618, Va. Code Ann.

⁸ Cox v. Jordan, 86 Ill. 567; See Section 3149.

⁹ Sketoe v. Ellis, 14 Ill. 75, 76 (1852).

¹⁰ Cox v. Jordan, 86 Ill. 564; Sec. 21, c. 80, Hurd's Stat. 1909.

¹¹ Cox v. Jordan, 86 Ill. 565, 567.

CHAPTER LVI

DRAINAGE ORGANIZATION, ASSESSMENT, DISSOLUTION AND TAXATION

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DRAINAGE ORGANIZATION

3155 Proceeding and organization, nature

A proceeding for the organization of a special drainage district is neither a suit at law nor a proceeding in chancery.¹ An organized drainage district is a *quasi* public or municipal corporation.²

¹ *Meyers v. Newcomb Drainage District*, 245 Ill. 140, 145 (1910).

² *Chicago, Burlington & Quincy Ry. Co. v. People*, 212 Ill. 103, 119

3156 Law governing, validity

A drainage district is subject to the provisions of the particular act under which it is organized, and its organization will be tested by that law.³ The Sanitary District act of 1907 is valid.⁴

3157 Natural water-course; individual's rights, notice

Every owner of land along a natural water-course has a right of drainage and a natural easement appurtenant to the land of every other owner through whose land such natural water-course is running, of which right all of such owners are obliged to take notice.⁵

3158 Territory

A drainage district may be created under the Farm Drainage law of a portion of a city, village or town territory, if such territory is not organized and used by the municipality as part of a district for drainage purposes within its jurisdiction.⁶

But a drainage district cannot be organized out of territory that is included in an existing legally organized drainage district, for two municipalities cannot exercise jurisdiction over the same territory for the same purpose at the same time.⁷

This rule is not affected by sections 2 and 9 of the Levee act which authorizes a combination system of drainage.⁸

3159 Parties, highway commissioners

Commissioners of highways are deemed landowners and have the same rights as private persons in the organization of a drainage district.⁹ The commissioners of highways of one town have no authority to organize a district when the lands involved extend into two or more towns.¹⁰

(1904); *People v. Crews*, 245 Ill. 318, 322 (1910); *People v. Niebruegge*, 244 Ill. 82, 85 (1910).

³ *Chicago, Burlington & Quincy Ry. Co. v. People*, 212 Ill. 108; *Aldridge v. Clear Creek Drainage District*, 253 Ill. 251, 252 (1912).

⁴ *People v. Bowman*, 247 Ill. 276, 281 (1910); *Hurd's Stat.* 1909, p. 923.

⁵ *Chicago, Burlington & Quincy Ry. Co. v. People*, 212 Ill. 109.

⁶ *Joliet v. Spring Creek Drainage*

District, 222 Ill. 441, 457 (1906); *People v. Nibbe*, 150 Ill. 269, 270 (1894).

⁷ *People v. Lease*, 248 Ill. 187, 192 (1911); *People v. Whittaker*, 254 Ill. 537, 541 (1912).

⁸ *People v. Crews*, 245 Ill. 323, 324.

⁹ *People v. Magruder*, 237 Ill. 340, 345 (1908).

¹⁰ *People v. Schafer*, 228 Ill. 17, 21 (1907).

PETITION

3160 Jurisdictional facts

A petition for the organization of a drainage district is jurisdictional.¹¹ Every essential fact which is necessary to confer jurisdiction upon the court must affirmatively appear from the record.¹²

3161 Description

A petition for the organization of a drainage district under the Farm Drainage act must set out a description of the ditch and its branches and a description of lands proposed to be included in the district, from which it should appear that the ditch and its branches are continuous and are connecting with the lands proposed to be taken into the district.¹³ All the lands which drain into a ditch or channel may properly be included,¹⁴ but not lands of owners who merely contribute to a drainage fund.¹⁵ The boundary lines of a proposed drainage district must be so definitely drawn that they can be traced on the map; and this requirement is jurisdictional.¹⁶

In the organization of a drainage district under the Levee act of 1885, the description is an essential element of the petition and should show the starting points, route and terminus of the proposed work and the location of the levees, drains and ditches.¹⁷

3162 Purpose

A petition for an original drainage assessment, or for an additional assessment should set out clearly the nature and character of the work which is to be done, or the purpose for which the money is to be raised by the assessment.¹⁸

3163 Prayer

The commissioners are not bound to organize a drainage district exactly as prayed for in the petition.¹⁹

¹¹ Aldridge v. Clear Creek Drainage District, 253 Ill. 257.

¹² People v. Karr, 244 Ill. 374, 383 (1910); Tinsman v. Probate Judge, 82 Mich. 562, 564 (1890).

¹³ People v. Karr, 244 Ill. 382.

¹⁴ People v. Magruder, 237 Ill. 346.

¹⁵ People v. Magruder, *supra*.

¹⁶ Drummer Creek Drainage District v. Roth, 244 Ill. 68, 74 (1910).

¹⁷ Aldridge v. Clear Creek Drainage District, 253 Ill. 255.

¹⁸ Schafer v. Gerbers, 234 Ill. 468, 470 (1908).

¹⁹ Barnes v. Drainage Commissioners, 221 Ill. 627, 631 (1906).

3164 Signing

A petition for the organization of a drainage district must be signed by the owners representing the necessary proportion of the individual acreage; and such a signing is jurisdictional.²⁰

3165 Form (Ill.)

State of Illinois, }
 county. } ss.

In the county court of county,

To the term, 19..

In the matter of the petition for the organization of the drainage district in the town of, in the county of, and state of Illinois, and in the town of, in the county of, and state aforesaid, for agricultural and sanitary purposes, being a combined system of drainage, independent of levees.

To the honorable judge of the county court:

The undersigned petitioners, respectfully represent unto your honor that they are a majority of the owners of land within the district herein proposed to be organized; that they are of lawful age; that they are the owners of and represent one-third in area of the lands to be benefited by the proposed drain; that they desire to construct a drain or drains, ditch or ditches, to establish in said district a combined system of drainage and protection from overflow for agricultural and sanitary purposes, independent of levees, and to maintain the same by special assessments upon the property benefited; that said lands are in the county of and in the county of, in the state of Illinois, the greater part of said land being in said county; and that the name of the proposed district is drainage district.

Your petitioners further represent that the necessity for the organization of said district exists on account of the said lands not being drained and the said lands are greatly damaged on account of the lack of drainage.

Your petitioners further represent that they desire that a drainage district may be organized embracing the following described lands, to wit: (Set out description of lands). All in section, town north, range, principal meridian; all of said lands being in county, Illinois.

That in addition to said lands the right of way of through sections, town north, range, principal meridian, all drains

²⁰ Drummer Creek Drainage District v. Roth, *supra*.

into the ditches in said proposed district and will be greatly benefited by the construction of the same.

That the following are the names of the several owners of land comprised in the said proposed drainage district, with their post-office address, so far as the same are known to the petitioners, or either of them, with a description of the land owned by each:

| Description of land | Number of acres | S. T. R. | Owner's name | Post-office address |
|---------------------|-----------------|----------------|--------------|---------------------|
| | | | | |

The following tracts in addition to the foregoing mentioned lands will be greatly benefited by the construction of said drain:

The right of way of the

Your petitioners therefore pray that notice shall be given of the filing of this petition as is provided by law; that your honor, upon the hearing, may enter an order organizing said district by the name and boundaries proposed, and appoint commissioners as is provided by law for the purpose of constructing and repairing and maintaining drains within said district for agricultural and sanitary purposes independent of levees by special assessment upon the property benefited thereby; and that, who reside in township, county, Illinois, and who are adult owners of land in said township be appointed as commissioners as aforesaid.

(Signatures)

(Venue)

(Insert names of three persons), being each duly sworn on oath state that they are each of lawful age; that they each signed the petition for said drainage district to be known as the drainage district, filed in county court,, 19..; that they are the owners of the land described in the said petition which lands are proposed to be affected by the work described in the petition; that each has, and they all have, examined the said petition and are acquainted with the locality of the lands in the said proposed drainage district, which lands are specifically described in the said petition as to the area of said district; that the schedule annexed to and made a part of said petition, contains the names of the owners of each of the tracts of said lands and his or their post-office address; that the said petition is signed by a majority of the owners of the land in the said proposed district who are of lawful age; and that the said persons, who signed said petition, are the owners of and represent more than one-third in area of the lands in said district, proposed to be

affected by the organization thereof and the work proposed to be done in said district.

(Three signatures)

Subscribed, etc.

Order

Petition was filed this day, and date of hearing set for, 19.., at o'clock .. M. The clerk is directed to publish notice in the newspapers and post notices pursuant to the statute.

.....
Judge.

3166 Filing, filing-mark

In the organization of a drainage district extending through parts of two townships, a petition must be filed in the office of the town clerk of each town. The commissioners of highways of the two towns acting together, constitute the body having jurisdiction.²¹

The omission by the county clerk to state in his file-mark upon the petition for the organization of a drainage district that the petition was filed in the county court is supplied by a finding that such petition was filed in such court.²²

3167 Withdrawal of names

The signers of a petition for the organization of a drainage district have a right to withdraw their names as signers at any time before the rights of others have attached by final action of the board or court.²³ Parties may withdraw their names from the petition, upon proper application, notwithstanding section 4 of the Amendatory act of 1907.²⁴

3168 Application to withdraw names

(Caption)

We, the undersigned, who signed the aforesaid petition, do hereby withdraw our signatures therefrom, believing that the

²¹ McDonald v. People, 214 Ill. 83, 87 (1905).

²² People v. Munroe, 227 Ill. 604, 607 (1907).

²³ Mack v. Polecat Drainage District, 216 Ill. 56, 58, 61 (1905).

²⁴ Boston v. Kickapoo Drainage District, 244 Ill. 577, 579 (1910); Par. 4, sec. 4, c. 42, Hurd's Stat. 1909, p. 857.

organization of said district asked for, is not for the best interest of the property included therein.

We therefore retract the prayer of said petition and hereby certify that we no longer are willing for our names to remain on said petition.

(Signatures)

NOTICE

3169 Affidavit of nonresidence

(Caption)

....., being first duly sworn upon oath, states that and, each owners of land in said district described in the petition which is accompanied by this affidavit and attached thereto, are none of them residents of either the county of or the county of in the state of Illinois, but that their places of residence and post-office addresses respectively are as follows:

.....,,

Further affiant saith not.

.....

Subscribed, etc.

3170 Notice, requisites

The notice required by statute to be given upon the filing of a petition for the organization of a drainage district may be made returnable on any day which is far enough in the future to permit the statutory notice to be given, although the day is not the first day of any term of the county court and is not a day which has been fixed or designated in any manner as the return day of any term of that court.²⁵

Notice of the presentation and the filing of a petition signed by "county clerk" instead of the clerk of the county court is not invalid, for parties are bound to take notice of the fact that a county clerk is clerk of the county court.²⁶

3171 Form (Ill.)

To all persons interested:

You are hereby notified that a petition to organize a drainage district for agricultural and sanitary purposes, the proposed work to consist of a combined system of drainage independent of levees, was filed on the day of, 19...

²⁵ People v. Munroe, 227 Ill. 608.

²⁶ People v. Munroe, *supra*.

in the county court, the greater part of said land of said district being in county, Illinois, and is now on file therein; that the boundaries of said district are as follows: (Insert description). All in section town..... north, range west of the principal meridian; all of said land being in county, Illinois. Also the right of way of the through sections (Describe land supporting the easement); that the name of the proposed drainage district is the drainage district; and that the said court has fixed on, 19.., at o'clock .. M., for the hearing of said petition, it being the day of the term, 19.., of said court, said court to be held at, Illinois.

Dated this day of, 19..

.....
Clerk of county court.

.....
Attorney.

3172 Mailing

It is not necessary that the town clerk shall personally mail the notice to nonresident landowners.²⁷

COMMISSIONERS

3173 Appointment, order

(Caption)

Now, on this day of, 19.., it being the day of the term of said court for the year aforesaid, this cause coming on to be heard, and it appearing to the court that on the day of, 19.., the petition of (Name petitioners) for the organization of the drainage district, was presented and filed in the clerk's office of the county court in said county court, and that the judge of the county court made an order fixing the day of, 19.., at the term of said court as the day for the hearing of said petition, the court doth find that thereupon the clerk of said county court did cause three weeks' notice of the presentation and filing of said petition by posting notices in ten of the most public places in said proposed drainage district, as herein described, by posting a copy of said notice for four consecutive weeks in the and, a newspaper

²⁷ Barnes v. Drainage Commis-
sioners, 221 Ill. 630.

of general circulation, published in said county, the first insertion being, 19.., and the last insertion being, 19.., and by posting a copy of said notice at the door of the court house in, Illinois, and that all of said notices so posted, were posted on, 19.., that said notices so posted, published and mailed as aforesaid were as follows: (Insert notice); that the clerk of the county court did send a copy of the aforesaid notice, as published in said paper, to each of the landowners in said district, who are not residents of county or county, properly addressed to each; that said notices were mailed to each nonresident landowner, aforesaid, within three days after the first publication of the same; that all the notices were in form as described by law and were properly given, posted, published and mailed; and that the court has full jurisdiction of the subject matters.

And thereupon signers of said petition, entered a motion and filed the same asking to withdraw their names from said petition, which motion was overruled by the court.

And the court having heard the evidence doth find that the said petition contains the signatures of a majority of the owners of the land within the said proposed drainage district, who are of lawful age, and who represent more than one-third in area of the lands proposed to be included in said district; and it appearing to the court that the proposed drain or drains, ditch or ditches are necessary and will be useful for the drainage of lands proposed to be drained thereby for agricultural and sanitary purposes, and a majority of the land owners of said proposed district having petitioned the court to appoint,, and, as drainage commissioners, and the persons last named being competent men, and owners of land in said district, they are hereby appointed as drainage commissioners for said district, to have the powers given them by the statute, and to hold office until their successors are appointed as provided by law, they being empowered to lay out and construct such proposed work as is described in said petition within the boundaries of said district; and the court hereby establishes the boundaries of said district as follows: (Insert description).

It is further ordered by the court that before entering upon the duties of their offices, said commissioners shall take and subscribe an oath to faithfully discharge the duties of their office without favor or partiality and to render a true account of their actions to this court whenever required by it, or by law; which oath shall be filed with the clerk. Said commissioners shall elect one of their number chairman, and one of their number secretary. A majority of the commissioners shall

constitute a quorum and a majority of them shall be sufficient to act.

Said commissioners shall as soon as may be after their appointment examine the lands of the petitioners, and other lands proposed to be drained and the lands over which the work is to be constructed and determine: 1. The starting point, route and termini of the proposed work, and the location thereof, and whether said work is in all respects proper and feasible; 2. The probable cost of the work mentioned in the petition, including all incidental expenses and costs of the proceedings thereof; 3. The probable annual cost of keeping the same in repair after the work is completed; 4. What lands will be injured by the proposed work, and the probable amount of the damages such lands will sustain by reason of the laying out and construction of such work; 5. What lands will be benefited by the construction of the proposed work and whether the aggregate amount of benefits will equal or exceed the costs of the construction of such work, including incidental expenses, and the cost of all proceedings and damages; 6. Whether the proposed district as set out in the petition will embrace all the lands that may be damaged or benefited by the proposed work, and if not, to report what additional lands will be affected. And said commissioners are hereby empowered to do any and all things authorized by law under which their appointment is made.

.....
County Judge.

3174 First election

Upon a town clerk is imposed the duty to call the first election of drainage commissioners; and this duty is not discharged by merely failing to call the election at the time provided by statute.²⁸

Since the act of February 27, 1909, the town clerk has no authority to select drainage commissioners.²⁹

3175 Duties and powers

Within ten days after the commissioners receive notice of the filing of the petition, they are required to examine the lands, but they are not required to organize a district until they have complied with other provisions of the statute.³⁰ The commissioners have no power to organize a drainage district at the first meeting.³¹

²⁸ *People v. Morrell*, 234 Ill. 47, 52 (1908).

²⁹ *People v. Morrell*, 234 Ill. 51.

³⁰ *McDonald v. People*, 214 Ill. 90.

³¹ *McDonald v. People*, 214 Ill. 89.

3176 Meetings; notice, posting

The meetings of the commissioners for the organization of a drainage district must be held within the territorial limits of the proposed district, although notices of such meeting may be posted in or near such district.³²

The hearing of objections to a classification and its confirmation are jurisdictional, but not the drawing up of the classification. A classification which is drawn up beyond the district is valid if the hearing of objections and the confirmation of the classification take place within the district.³³

3177 Meetings; adjourned, notice

The same notice as to time, place and purpose of an adjourned meeting is required as is necessary to be given in other cases of the organization of a drainage district.³⁴

3178 Report (Ill.)

(Caption)

To the honorable, judge of the county court of county.

We, the commissioners of district, as soon as we could after appointment, first having duly taken the oath of office prescribed by statute, did examine the lands of petitioners proposed to be drained and the lands over or upon which the work is proposed to be constructed, and we find:

1. That the proposed drainage is feasible.
2. That the probable cost of the work mentioned in the petition including all incidental expenses and the cost of proceedings therefor is dollars.
3. That the probable annual cost of keeping the same in repair after the work is completed is dollars.
4. That no lands will be injured by the proposed work, that said lands will not sustain any damages by reason of the laying out and construction of such work.
5. That all the lands described in the petition will be benefited by the construction of the proposed work except (Specify lands which will not be benefited); and that the aggregate benefits to said lands will exceed the cost of construction of said work, including all incidental expenses, cost of proceedings and damages.

³² *People v. Hepler*, 240 Ill. 196, 199, 200 (1909).

³⁴ *McDonald v. People*, *supra*.

³³ *People v. Adair*, 247 Ill. 398, 400 (1910).

6. That the proposed district as set out in the petition filed will embrace all the lands that will be damaged (no land will be damaged, and that said petition embraces all the land that will be benefited.

The said commissioners did find that the proposed work could be done at a cost and expense not exceeding such benefits and after so finding did employ, a competent engineer, and proceeded to have made the proper surveys, profiles, plats, plans and specifications of said drain. That we, the said commissioners, have now located, designed, laid out and planned said ditches in such manner as we think will drain or protect the petitioners and all the lands of said district with the least damage and greatest benefit to all lands to be affected thereby; a copy of which surveys, profiles, plats, plans, maps and specifications thereof made by the are attached to this report and approved by us, the said commissioners. That the main ditch marked on the plat "Main channel" has for its starting point as follows: beginning at a point (Describe land, etc.) as shown by said engineer's report, plats, plans, profiles, maps and specifications attached to this report. That the dimensions of the main channel are shown in the profiles and specifications hereto attached. That the boundaries of said district as adopted by these commissioners are as follows (Describe boundaries).

Said commissioners, your petitioners, ask that the clerk of the county court may give the notice as is required by law, fixing the time for the hearing of this report, and that upon the hearing your honor may confirm said report, and your petitioners have such other relief in the premises as is just and equitable.

Dated, etc.

(Three signatures),
Drainage commissioners.

b

To the honorable, judge of the county court of county.

The undersigned, commissioners by appointment of the district of county, Illinois, respectfully make report in the following words and figures:

That these commissioners have gone upon the lands of the petitioners proposed to be drained, and the lands of others who are not petitioners, but whose lands are included in the district and which are proposed to be drained, and have examined the land over and upon which the work is proposed to be constructed, and have found all the lands included in the petition filed herein in need of drainage, and that the same can be drained to the satisfaction of the petitioners at an expense smaller than the benefits which will be derived from the work

proposed; that we have engaged the services of, a competent engineer, to assist us in laying out ditches and drains, and report to us, and the said engineer having made his report, and from said report and from our own personal examination of all the lands in the proposed district we have determined as follows:

1. That the outlet of the water in said district shall be in, just east of the bridge, which bridge is on the highway, which creek is the natural outlet of the main ditch, thence following up the old county ditch, and joining the ditch proposed in the petition, which ditch shall be extended to near the: (Describe location) principal meridian, in county, Illinois, as per plat herewith submitted and marked thereon as "Main ditch."

We have determined also that the branches to said "Main ditch" known and designated on the plat as "second north branch," "first north branch" and "south branch," all of which are shown and marked on the plat, are necessary to provide drainage for said lands; and we hereby make and constitute the said plat, as prepared by, a part of this, our report; and we find that the ditches and drains as designated and laid out on said plat are in all respects proper and feasible. We recommend that the "south branch" run at right angles across the (Describe location) as this will create less damage than if it is constructed in the line as shown on the plat.

2. The probable cost of the work mentioned in the petition including all incidental expenses and the costs of the proceedings, including the costs of making the outlet beyond the boundaries as petitioned for, will be dollars.

3. The probable annual cost of keeping the same in repair after the work is completed is dollars.

4. The lands that will be injured by the proposed work are as follows: (Insert legal description); and the probable aggregate amount of damages such lands will sustain by reason of the laying out and construction of said work is dollars.

5. All the lands described in the petition filed herein will be benefited by the construction of the proposed work, and the aggregate amount of benefits to said lands will greatly exceed the cost of constructing said work, including all incidental expenses, cost of proceedings and damages.

6. The proposed district as described and set out in the petition filed does not embrace all the lands that may be damaged or benefited by the proposed work; and we hereby report the following lands that will be benefited: (Insert description) in county, Illinois.

We also find that the proposed work as set out in the maps, plans, profiles and specifications, which are hereby made a

part of this report, including the work on the lands proposed to be annexed, can be done at a cost and expense not exceeding such benefits; the starting point, route, and termini of the ditches and drains and the dimensions of the same as shown by the surveys, plats, plans and specifications herewith filed, has been determined by us as the proper and feasible method and manner of draining the lands in the said district and the lands proposed to be annexed except as to the "second north branch," which we recommend to be of the width of feet at the bottom instead of feet as shown by the specifications herewith filed, and the slope to be to

We have concluded that the "Main ditch" should be a dredge ditch from its outlet to the tracks, and also that the "south branch" should be dredged from its junction with the "Main ditch" to the tracks, as shown on the plat; and that all of the drains and ditches shall be constructed with scrapers; and that all ditches and drains as shown by the maps, plats, plans, profiles and specifications herewith filed and made a part of this report, shall be constructed according to the plans and specifications and on the lines as shown on the plat, except as heretofore set out and modified or changed.

The commissioners further report to the court that all the lands described herein are in township, range, west of the principal meridian, in the county of, in the state of Illinois, and that the abbreviations herein employed mean and stand for the following: (Insert abbreviations).

All of which is respectfully submitted.

Dated, etc.

Plans and specifications

(Caption)

Plans and specifications of the ditches in above named drainage district and made a part of the commissioners' report.

Main Ditch

From station to Bottom width feet slopes to

(Specify similarly as to all stations)

South Branch

(Specify as in "Main ditch")

For grades and depths see profiles.

It is estimated there will be cubic yards of excavating. The boundaries of the drainage district are shown on the map by heavy dotted lines, and the

additions or annexations by lines in red ink. The stations are feet in length. The bench mark is (Designate location) in county, Illinois.

All the elevations on the profiles are connected with and relate to the above described bench mark.

The new lands added are owned by the following persons:
.....,, acres.

3179 Notice (Ill.)

To all persons interested:

Take notice that on the day of, 19.., there was filed and now remains on file in the county clerk's office at the court house in the city of, in the county of, and state of Illinois, a report of the commissioners of the drainage district of county, Illinois, together with a plat and description of the work laid out and proposed to be constructed.

The additional lands recommended by the said commissioners to be embraced in the proposed district are: (Insert description), all in the county of, in the state of Illinois; and that application will be made for the confirmation of such report on the day of, 19.., before the county court at the court house in the city of, in the county of, and state of Illinois, and at which time you may appear and contest the confirmation thereof, or show that additional drains, ditches or other work should be constructed, or that the report ought to be modified in any particular.

Dated, etc.

.....
Clerk of the county court of
county, Illinois.

.....,
Attorney for commissioners.

3180 Proof of posting

(Caption)

....., being first duly sworn on his oath, says that on the day of, 19.., being within days of its first publication, he did post up in ten of the most public places within the boundaries of the proposed drainage district, copies of the annexed notice; the said places being as follows:

One on a post by corner (Set forth the other nine places in similar manner).

All of the above places being in the most public places within the said proposed drainage district.

.....
Subscribed, etc.

ORDERS

3181 Jurisdiction

A legally organized drainage district derives its powers exclusively from the statute, and not from the judgment of the court. In the organization of a district, all that the court may do is to see that there is a compliance with statutory requirements.³⁵

3182 Requisites

An order establishing a drainage district, the boundaries of which have been changed, may provide for a change of the name of the district or the proposed district.³⁶ The order must state that the "district is duly established as provided by law."³⁷

3183 Annexing lands

(Caption)

This cause coming on to be heard upon the petition of to annex certain of his lands to said drainage district, and it appearing to the court that due and proper notice was given by said petitioner to the commissioners of said district as is by statute provided, and it further appearing that said commissioners of said drainage district have in writing admitted the truth of the allegations in said petition, and consented to the annexation of said lands of the petitioner to said district.

Now, therefore, it is ordered that the following described tract of land, to wit: (Describe property) situated in the county of, and state of Illinois, be and the same is hereby annexed to and made a part of said drainage district, and shall be assessed for the benefits as other lands therein.

.....
Judge.

3184 Approving report and ordering assessment

(Caption)

Now on this day of, 19.., come commissioners heretofore appointed by the court to examine the lands of the petitioners for the purpose specified in the

³⁵ Deople v. Lease, 248 Ill. 187, 193 (1911); Secs. 2, 59, Levee act.

³⁶ People v. Niebruegge, 244 Ill. 84; Par. 12, Hurd's Stat. 1908, p. 820.

³⁷ Mack v. Kickapoo Drainage District, 216 Ill. 61.

petition filed in this court, and herein file their report, and it appearing to the court that due notice has been given to all persons interested, for the length of time, and in the manner required by law, of the application to this court for the confirmation of said report, and the court having duly examined said report, and considered all objections to the same, it is ordered by the court that the report of said commissioners be and the same is hereby confirmed; and the court further finds that the work proposed in said petition to be done, will be useful for agricultural purposes to the owners of the lands within the proposed district, that the persons who have signed the petition are of lawful age and are a majority of the landowners and who represent in area of the land to be affected by such proposed work; that said drainage district of the corporate name mentioned in said petition, viz., drainage district No., comprises the following described lands, to wit: (Insert legal description), all of the foregoing lands being in the town of, county, Illinois, and the following lands in the town of, county, Illinois, viz.: (Insert legal description), that said district is duly established as provided by law; and that it is for the best interest of those concerned that the said commissioners,, make the assessment of benefits or damages and benefits herein named; and they are therefore hereby ordered and directed by the court to make such an assessment.

.....
County Judge.

3185 Establishing district

(Caption)

In the matter of the petition of (Insert names) this day the report of, and, commissioners heretofore appointed by this court to examine the lands of the petitioners for the purpose specified in the petition filed in this cause, having been filed, and it appearing to the court that due notice has been given to all persons interested, for the length of time and in the manner required by law, of the application to this court for the confirmation of said report, and the court having duly examined said report and considered all objections to the same, it is ordered by the court that the report of said commissioners as modified by the court, be and the same is hereby confirmed; and the court finds that the work proposed in said petition to be done, will be useful for agricultural, sanitary or mining purposes to the owners of lands within said proposed district; that the persons who have signed said petition are of lawful age, and are a majority of the landowners, and who represent

one-third in area of the land to be affected by such proposed work; that the said petition contains the majority of the names, as signers to said petition, of all the landowners in the proposed district, including the names of the owners of lands annexed, and that they, together with the signers of said petition represent in area more than one-third of the lands to be affected by the proposed work; that said drainage district of the corporate name mentioned in said petition, viz., and county, Illinois, is bounded as follows: (Insert description), all of which lands within the boundaries aforesaid lie in township, range west of the principal meridian, in the county of, in the state of Illinois; and that said drainage district is duly established as provided by law.

.....
County Judge.

3186 Confirmation unnecessary

An order which declares the organization of a drainage district does not require an order of confirmation to make it effective.³⁸

VACANCIES

3187 Petition

(Caption)

To the honorable, judge of said court:

The undersigned petitioners respectfully represent that they are a majority of the landowners owning land in said district, that they own a majority of the acreage of the land embraced in said district, that all original drains and ditches, for the construction of which this district was organized, have been completed, that, one of the commissioners of said district, is dead, that, one of the commissioners of said district has resigned, that the term of office of has expired, that it is necessary for the interests of said district that three commissioners be appointed for the purpose of protecting and maintaining said district.

We, therefore, request the appointment of,, as commissioners, their terms of office to be as follows, for the term of years, for the term of years, and for the term of year.

Dated, etc.

(Proper number of signatures)

Granted, 19..

..... County Judge.

³⁸ Meyers v. Newcomb Drainage District, 245 Ill. 142.

3188 Order

(Caption)

This cause coming on to be heard upon the petition filed herein on the day of, 19.., for the removal of the present acting commissioners, and the appointment of new commissioners of drainage district No. counties, and the court having heard the testimony of witnesses and examined the proofs submitted and being fully advised in the premises, doth find that the terms of office of the present acting commissioners aforesaid, namely,,, have long since expired, and that new commissioners should be appointed for said drainage district No. counties to succeed all of the aforesaid parties acting as such commissioners.

And the court doth further find that by statute in such cases made and provided, it is vested with full power and authority to appoint such commissioners as may be needful and proper for said district at this time, in case a petition is properly presented to said court for such appointment, signed by a majority of the adult landowners of said district representing a majority of the acreage thereof; and that such a petition has been presented to this court, in the time prescribed by the statute in such case made and provided.

It is, therefore, ordered, adjudged and decreed by the court that, of the city of,, county, Illinois, be and he is hereby appointed commissioner of said drainage district No. counties, for the term of years; that of the city of, county, Illinois, be and he is hereby appointed commissioner of said drainage district No. counties for the term of years; and that, of the town of, county, Illinois, be and he is hereby appointed commissioner of said drainage district No. counties for the term of years, as by statute in such cases made and provided.

3189 Bond

Know all men by these presents that we,, in our official capacity as commissioners of drainage district No. counties, as principals, and security, are held and firmly bound unto the people of the State of Illinois for the use of all persons interested, in the penal sum of dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally and firmly by these presents.

Witness, etc.

The condition of this obligation is such that whereas the

above-bounden have been constituted and appointed drainage commissioners of drainage district No. counties, under and by virtue of proceedings had in the county court of county, Illinois, on the application of certain petitioners, owners of land in said district.

Now, if they, the said, as such commissioners, shall well, faithfully and truly make application of all moneys that may be received by them, as such commissioners, and make due account thereof to the court whenever required by law or by orders of court, and otherwise, in all respects, execute their said trust as per statute in such case made and provided, then this obligation shall be void; otherwise it shall remain in full force and effect.

(Signatures and seals)

Approved, 19..

.....
County Judge.

3190 Oath

(Caption)

We, the undersigned, commissioners appointed by the court in the above entitled matter, do hereby solemnly swear to faithfully discharge the duties of our office without favor or partiality, and to render a true account of our doings to the court whenever required by law or the order of the court so to do.

(Signatures)

Subscribed, etc.

ANNEXATION

3191 Proceeding, nature

An application to assess lands which have been annexed to a drainage district is a separate and distinct proceeding.³⁹

3192 Jurisdiction

The court in which a drainage district was organized has exclusive jurisdiction of annexation proceedings.⁴⁰

3193 Complaint, requisites

A complaint to annex lands which are benefited by a drainage district must state that the landowners whose lands are sought

³⁹ Kickapoo Drainage District v. District, 253 Ill. 332, 337 (1912); Jackson, 255 Ill. 504, 506 (1912); Secs. 4, 58, Laws 1885, p. 108 *et seq.*

⁴⁰ People v. Sangamon Drainage

to be annexed have connected their ditches or drains with those of the district.⁴¹

3194 Assessment roll, requisites

In a proceeding to assess annexed lands, the assessment roll should state the purpose of the assessment or the use to which the money shall be applied after the assessment has been made, unless the purpose or the use sufficiently appears from other parts of the proceeding; and if the assessment is for the contribution of the proportionate cost of the original completed improvement, the assessment roll should state the amount of these costs, and if the improvement is uncompleted, the estimated cost should be given.⁴²

3195 Objections, scope

Any defense that the owners of lands in the original district could properly have interposed to their assessment or to the collection thereof is available to the owners of annexed lands in a proceeding to assess them.⁴³ The commissioners' omission in their report to properly itemize the cost of the improvement, and the method adopted for the levying of the original assessment, cannot be urged upon an application to assess annexed lands.⁴⁴

3196 Objections, benefits

In assessing benefits to annexed lands, the jury must consider the whole district as a unit, including the annexed lands, and assess the benefits against the annexed lands proportionately on the basis that the improvement cost the whole district and as an original and first assessment, without reference to any former assessment of benefits. The benefits thus assessed against the annexed lands constitute the amount which should contribute to the original cost; and the amount raised by the assessment should then be rebated, in proper proportion, to the lands originally assessed, excluding the annexed lands, thereby enabling

⁴¹ Kickapoo Drainage District v. Jackson, *supra*; Sec. 58, Levee act.

⁴² Kickapoo Drainage District v. Jackson, 255 Ill. 506, 507.

⁴³ Kickapoo Drainage District v. Jackson, 255 Ill. 509.

⁴⁴ Kickapoo Drainage District v. Jackson, 255 Ill. 510; Sec. 9, Levee act.

all property in the district finally to pay its just proportion of the original cost of the work according to the benefits.⁴⁵

3197 Objections, complaint

Upon an application to assess annexed lands, it is too late to urge the sufficiency of the complaint that was filed in the annexation proceedings.⁴⁶

3198 Judgment, appeal

An order which annexes lands to an organized district is final and is appealable.⁴⁷

DRAINAGE ASSESSMENT

3199 Proceeding, nature

Each kind of an assessment for drainage purposes is separate and distinct and must be prosecuted as such. Thus, assessment proceedings for a second and third assessment and for an annual assessment for repairs are independent proceedings.⁴⁸

3200 Jurisdiction

Drain commissioners obtain jurisdiction from the filing of a proper petition, and such jurisdiction is not affected by subsequent irregularities.⁴⁹

CLASSIFICATION

3201 Diligence

No specific time is fixed by Michigan statute within which the drain commissioners shall proceed with the application, but the commissioners or their successors are required to proceed with reasonable diligence.⁵⁰

⁴⁵ Kickapoo Drainage District v. Jackson, 255 Ill. 508, 509.

⁴⁶ Kickapoo Drainage District v. Jackson, 255 Ill. 506.

⁴⁷ Kickapoo Drainage District v. Jackson, *supra*.

⁴⁸ Vandalia Drainage District v. Vandalia R. Co., 247 Ill. 114, 120 (1910).

⁴⁹ Ranney Refrigerator Co. v. Smith, 157 Mich. 302, 304 (1909).

⁵⁰ Davison v. Drainage Commissioners, 24 Mich. 23, 25 (1871); Ranney Refrigerator Co. v. Smith, *supra*.

3202 Notice, necessity

The only notice to which landowners are entitled is that of the classification of their lands.⁵¹

3203 Notice (Ill.)

To whom it may concern:

You are hereby notified that the commissioners of special drainage district in and counties and state of Illinois have filed their classification of the lands in said district and that they will on the day of, 19.., at the hour of in thenoon meet at the court house in the of in the county of and state of Illinois, to hear any and all objections that may be made to the same; when and where you can appear and be heard if you so see fit.

Dated at, county of, state of Illinois, this day of

.....
County clerk of county,
Illinois, and ex-officio clerk of said
drainage district.

3204 Classification, nature

The rights and liabilities of landowners are determined by the classification, and not by the spreading of an assessment.⁵² A classification becomes absolutely void after the finding by the drainage commissioners that it has been unfairly adjusted, and it cannot be revived by the annulment of a new classification.⁵³

3205 Classification, annexed lands

Under section 55 of the Illinois Levee act, at any time after new lands are brought into the district, the owners can be compelled to pay their proportionate share of the original cost of the improvement either by being assessed in a separate proceeding or by being assessed together with other lands throughout the district; and the amount collected from the annexed lands may be rebated proportionately to the lands originally assessed so that all the property in the district shall finally pay its proportion according to benefits of the original cost of the work.⁵⁴

⁵¹ People v. Hulin, 237 Ill. 122, 125, 126 (1908).

⁵² People v. Schwank, 237 Ill. 40, 45 (1908).

⁵³ People v. Schwank, 237 Ill. 44.

⁵⁴ Schafer v. Gerbers, 234 Ill. 472.

3206 Classification; meetings, notice and record

For the purpose of making a drainage assessment, the meetings of the drainage commissioners must be held within the boundaries of the district pursuant to notice given to the commissioners and the clerk; and it is essential that the proceedings should be preserved according to statute.⁵⁵

3207 Classification; assessment, amount

The commissioners have no power to spread an assessment for a greater sum of money than the estimated cost of the work which has been approved and confirmed by the court, and the court is without jurisdiction to confirm an assessment exceeding in amount the estimated cost.⁵⁶

3208 Classification; assessment, benefits

A drainage assessment cannot be made against a tract of land as a unit where the drainage district is a perpetual easement on a portion of such land.⁵⁷

In a proceeding for the organization of a drainage district an assessment of benefits to lands, a portion of which is to be taken for the construction of ditches, should not be made by the commissioners until after they have caused the damages for the land taken to be assessed by jury in a proceeding under the Eminent Domain act, provided the jury, in the condemnation proceeding, has found that the land not taken is not damaged; because a finding that such land is damaged is a determination that the property is damaged to the extent of the amount awarded the owner as compensation, above any benefits that may have accrued to it from the improvement and precludes any assessment of benefits against the land by the commissioners.⁵⁸

The authorities of a drainage district organized under the Levee act have no power by virtue of section 55 of said act, or otherwise, to assess benefits to public streets and alleys against the consent of a city or village.⁵⁹

⁵⁵ *People v. Carr*, 231 Ill. 502, 507 (1907); *People v. Warren*, 231 Ill. 518, 520 (1907); *People v. Schwank*, 237 Ill. 45.

⁵⁶ *Morgan Creek Drainage District v. Hawley*, 240 Ill. 123, 130 (1909).

⁵⁷ *Morgan Creek Drainage District v. Hawley*, 240 Ill. 129.

⁵⁸ *Joliet v. Spring Creek Drainage District*, 222 Ill. 441, 453 (1906).

⁵⁹ *Joliet v. Spring Creek Drainage District*, 222 Ill. 459.

3209 Classification; assessment, instalments

The commissioners may order, under the Farm Drainage act, a drainage assessment to be divided into instalments, subsequent to its levy; and in the absence of proof to the contrary, it will be presumed that such division was made.⁶⁰

3210 Table of classification

The undersigned drainage commissioners of special drainage district, in and counties and state of Illinois, after our election and qualification as such commissioners, immediately did go upon the lands in said drainage district, and with the assistance of, a competent civil engineer and surveyor by us employed, determined upon a system of drainage for said district and did locate and advise upon the character of the work to be done, which said system, among other things, provides main outlets of ample capacity for the waters of said district, having in view the future contingencies, as well as the present, which said system of drainage so determined upon in the form of our written report including said engineer's report together with the maps, profiles, exhibits and papers pertaining thereto, are duly filed in the office of county clerk of county, who is ex-officio clerk of said drainage district; and thereupon and without delay and as soon as practicable thereafter, we did go upon and personally examine all the lands in said district, together with the highways thereof for the purpose of making a special assessment or assessments for the benefits of said lands, by classifying said lands, and we did, in pursuance of law, proceed and classify said lands in said drainage district in tracts of acres more or less according to the legal or recognized subdivision, on a graduated scale according to the benefits to be received by the contemplated drainage thereof.

The tracts of land which will receive most and about all of the benefits are marked one hundred and such as were by us adjudged and determined to receive a less amount of benefits are marked with a less number denoting its per cent of benefits, which said classification so made, we have caused to be properly tabulated as hereinafter set out, and we hereby authorize the same to be placed on file for reference and inspection, and which, when confirmed, shall remain as a basis for such levy of taxes or assessments as may be needed for the lawful purposes of said drainage district; which said classification and table is hereby submitted as our classification of said lands and is here in words and figures following, to wit:

....., 19..
..... county.

⁶⁰ People v. Hulin, 237 Ill. 124, 125.

| Owner's name | Subdivision of section | Section | Township | Range.....of the principal meridian | Acres | Number of classification on graduated scale |
|--------------|------------------------|---------|----------|--|-------|--|
|--------------|------------------------|---------|----------|--|-------|--|

3211 Assessment roll

State of Illinois, }
 county. } ss.

In the county court thereof
 term, 19..

In the matter of drainage district No., and
 counties:

We, the undersigned commissioners of above entitled drainage district, having been heretofore ordered by the court to make an assessment of the benefits and damages in the above matter as per orders entered in said court on the day of, 19.., have viewed the line of the proposed improvements in said drainage district for the purpose of ascertaining the amount of benefits which will accrue to each tract of land to be affected thereby in accordance with the statute in such case made and provided, and in accordance with the orders heretofore entered in this cause, do assess to each tract of land within the boundaries of said drainage district its proportionate share of the entire cost of such proposed repairs and improvements, and, in making such assessment, no tract of land herein mentioned has been assessed for a greater amount than its proportionate share of the estimated cost of the proposed work and the cost of the proceedings therefor, nor in a greater amount than it will be benefited by the said proposed improvements, and we do hereby classify and assess said lands as follows, to wit:

| Name of owner | Description of land | Sec. Tp. R. | Amt. taken | 1st. class | 2nd. class | Benefits |
|---------------|---------------------|-------------|------------|------------|------------|----------|
| | | | | | | |
| | | | | | | |

The undersigned commissioners further state that they have divided the lands of said district into classes, as per decree of record, as aforesaid; the class comprising the lands which they deem most benefited by said repairs or improvements; the class is benefited to the extent of one-half of the amount of benefit charged to lands of the class.

The lands thus classified are hereby assessed their proper proportion of the estimated cost of dollars for the entire work or improvement, and the amount found due

from each tract is hereby charged and set forth in the last column, marked "Benefits."

.....
 Commissioners of
 Approved, 19..

 County Judge.

OBJECTIONS

3212 Assessment, divisibility

An assessment against a town for benefits to the township roads or highways is valid and is enforceable against the town and not against the specific property that is benefited.⁶¹

Since the amendment of 1909, a drainage assessment is not an entirety, but it is severable as to each piece of property. The assessment may, as to part of the property, be confirmed by the court, and as to another part, it may be ordered spread by a jury.⁶²

3213 Assessment, land taken

No assessment can be made upon lands which are required for and are taken by the district for its levee in an original assessment of benefits derived from the organization of the drainage district under the Levee act.⁶³

3214 Assessment roll, signature

The signing of an assessment roll is optional with the judge.⁶⁴

3215 Benefits, assessment

In a proceeding to organize a drainage district neither the commissioners nor the jury drawn in accordance with the Act of 1879 and its amendments of 1885 have power to assess benefits and damages for lands taken for drainage purposes, as the provisions of said acts with reference to such assessments are

⁶¹ Vandalia Drainage District v. Vandalia R. Co., 247 Ill. 122; Sec. 31, art. 4, Const. (Ill.).

⁶² Vandalia Drainage District v. Hutchins, 252 Ill. 259, 261 (1911), overruling Spring Creek Drainage

District v. Elgin, Joliet & Eastern Ry. Co., 249 Ill. 260 (1911).

⁶³ Hutchins v. Vandalia Drainage District, 217 Ill. 561 (1905).

⁶⁴ Simpkin v. Drainage District, 223 Ill. 67, 68 (1906).

unconstitutional.⁶⁵ The damages can only be assessed by a duly selected, empaneled, sworn and acting jury under the constitution.⁶⁶

3216 Benefits, present and future

Property cannot be assessed for a sewer unless it is benefited by a present use of the sewer or by an assured future use of such a nature that the owner can enforce his right and thereby secure the benefits.⁶⁷

3217 Benefits, report of property

A drainage assessment is objectionable upon an application for confirmation, if there is no report by the assessing officer designating the district which will be benefited by the proposed sewer and describing the same by boundaries.⁶⁸

3218 Benefits, right of way

In assessing benefits to be derived from drainage, the direct benefit to the railroad as property, and not to the company in its business, must be considered. The indirect, uncertain and speculative benefit that may be derived from the increase of agricultural production and passenger traffic must be excluded from such consideration.⁶⁹

3219 Bonds, vote

A vote of the entire municipality is not necessary on the question of issuing sewer bonds under the Illinois Local Improvement act against a special assessment for an improvement which covers a part of the municipality, the act of 1909 being inapplicable.⁷⁰

3220 Classification, change of, notice

Drainage commissioners, without notice to landowners, have no power to correct, modify or re-classify lands which have been

⁶⁵ *Hutchins v. Vandalia Drainage District*, *supra*.

⁶⁶ *Michigan Central R. Co. v. Drainage District*, 215 Ill. 501 (1905).

⁶⁷ *Lawrenceville v. Hennessey*, 244 Ill. 464, 469 (1910).

⁶⁸ *Lawrenceville v. Hennessey*, *supra*.

⁶⁹ *Cache River Drainage District v. Chicago & Eastern Illinois R. Co.*, 255 Ill. 398, 405 (1912).

⁷⁰ *Lawrenceville v. Hennessey*, 244 Ill. 467; *Laws 1909*, p. 130.

classified upon hearing and notice. But an illegal attempt to change or re-classify an assessment as to one landowner will not affect others whose lands have been lawfully classified.⁷¹

3221 Classification, jurisdiction, waiver

All prior irregularities in regard to the manner in which a tract of land is brought into a district are waived by appearing and filing objections to the classification of the identical land.⁷²

3222 Classification, waiver

An objection to a classification of lands as town lots instead of farm property is waived if not made before the drainage commissioners within the time limited by their notice of classification for appearance and objection.⁷³ Acquiescence in a classification of lands for twenty years waives irregularities in the proceeding.⁷⁴

3223 Commissioners' authority

Landowners in a drainage district may object to a drainage assessment on the ground of incompetency of the persons who made it.⁷⁵

3224 Commissioners' nonresidence

A nonresident is disqualified from making a drainage assessment; and if he makes such an assessment, the same is void on application for confirmation.⁷⁶

3225 Commissioners' oath

A commissioner's oath to assess benefits which omits to state "against which no damages have been allowed" is a nullity because benefits can be assessed only to lands against which no damages have been allowed.⁷⁷

⁷¹ *People v. Baber*, 252 Ill. 432, 435 (1911).

⁷² *People v. York*, 247 Ill. 591, 595, 596 (1910); Sec. 76, Farm Drainage Act (Ill.).

⁷³ *People v. Hulin*, 237 Ill. 126.

⁷⁴ *People v. Schwank*, 237 Ill. 45.

⁷⁵ *Lacey Drainage District v. Langellier*, 215 Ill. 271, 275 (1905).

⁷⁶ *Lawrenceville v. Hennessey*, 244 Ill. 467; Sec. 6, art. 6, Cities and Villages act (Ill.).

⁷⁷ *Morgan Creek Drainage District v. Hawley*, 240 Ill. 128, 129.

3226 Commissioners' qualifications

Formerly, the ownership by commissioners of land which was subject to drainage assessment in the district rendered them incompetent to sit on the commission to determine questions arising upon objections.⁷⁸ Since the amendatory act of 1909 to the Levee act, commissioners who own land in the district organized under that act are competent to act in the assessment of benefits.⁷⁹

3227 County judges' interest

The transfer to the circuit court of the hearing of a drainage assessment on account of the county judge's interest in the land of the district, cannot be made under section 69 of the Illinois Administration act, because that section relates solely to the settlement of estates. The objection is sufficiently obviated by calling in another county judge who has no interest in the land of the district to preside at the hearing.⁸⁰

3228 Damages, accrual

The right to compensation and damages accrues to the owner of the land at the time of the construction of a permanent improvement.⁸¹

3229 Estimate

The original estimate may include attorney's, engineer's, surveyor's and commissioners' fees incurred in the necessary preliminary work done before the assessment is spread or levied. And when the amount is fixed in the estimate for the various items, it cannot be exceeded.⁸²

3230 Existing indebtedness

A previous indebtedness cannot be made the basis of an assessment either under the Farm Drainage act or the Levee

⁷⁸ Nutwood Drainage District v. Reddish, 234 Ill. 130, 132 (1908); Vandalia Drainage District v. Hutchins, 234 Ill. 31, 33 (1908); Union Drainage District v. Smith, 233 Ill. 417, 426 (1908).

⁷⁹ Meredosia Drainage District v. Evemeyer, 244 Ill. 115, 118 (1910); People v. Hulin, 237 Ill. 127.

⁸⁰ Vandalia Drainage District v. Vandalia R. Co., 247 Ill. 120.

⁸¹ Morgan Creek Drainage District v. Hawley, 255 Ill. 34, 41 (1912).

⁸² Vandalia Drainage District v. Hutchins, 234 Ill. 34.

act.⁸³ But a prior assessment which is void and unpaid on account of some irregularity in its proceeding but does not affect the merits of the assessment, may be included in a subsequent proceeding. An assessment which is void upon its merits cannot be so combined.⁸⁴

3231 Jurisdiction, property beyond limits

A municipality or a drainage district has no power to assess property lying outside of its territorial limits.⁸⁵

3232 Jury, waiver

In a drainage assessment, the property owner must specifically object to the denial of a trial by jury of the question of damages and benefits, or the objection is waived.⁸⁶ A separate jury is required for each assessment proceeding where there are different assessments levied for the same improvement.⁸⁷

3233 Jury; empaneling, notice, waiver

The selection and the empaneling of a jury to assess benefits must be made on notice to the landowners of the district as the selection and the empaneling of jurors are conducted as at common law.⁸⁸ An objection that the jury was improperly empaneled does not come too late if made upon notice given after the jury had been selected and empaneled, if no opportunity to make the objection was afforded by previous notice.⁸⁹

3234 Monopoly

It is lawful to require the making of a drainage improvement by means of a dredgeboat, where no particular make or ownership is specified, and where it does not appear that such a requirement was intended to prevent competition or to promote monopoly.⁹⁰

⁸³ *People v. Kuns*, 248 Ill. 42, 45 (1910); *Vandalia Drainage District v. Hutchins*, *supra*; Sec. 41, Hurd's Stat. 1911, p. 911; Sees. 63 and 64, *Ibid.*, p. 921.

⁸⁴ *Vandalia Drainage District v. Vandalia R. Co.*, 247 Ill. 121; Sec. 18, Levee act.

⁸⁵ *Lawrenceville v. Hennessey*, 244 Ill. 469.

⁸⁶ *Fountain Head Drainage District v. Wright*, 228 Ill. 208, 213 (1907).

⁸⁷ *Vandalia Drainage District v. Vandalia R. Co.*, 247 Ill. 121; Sec. 18, Levee act.

⁸⁸ *Vandalia Drainage District v. Vandalia R. Co.*, 247 Ill. 119; Sec. 37, Levee act 1907.

⁸⁹ *Vandalia Drainage District v. Vandalia R. Co.*, 247 Ill. 120.

⁹⁰ *Kickapoo Drainage District v. Jackson*, 255 Ill. 510.

3235 Notice; apportionment, proof

The failure to make proof of a notice of apportionment is an irregularity and is not fatal to the proceeding, provided notice is actually given.⁹¹

3236 Notice; classification, nonresident

Landowners who reside in other counties in the state must have reasonable notice, according to the circumstances of each particular case, of the meeting to classify land for drainage purposes.⁹²

3237 Notice, corrections

The ten days' notice given before the time fixed within the term for the correction of an assessment is sufficient under the statute, and it is not necessary that the notice shall be given ten days before the first day of the term.⁹³

3238 Omitted property, gas pipes and electric wires

Gas pipes and wires of electric light and gas companies laid within the streets and highways of a drainage district are not subject to a special assessment for drainage purposes.⁹⁴

3239 Omitted property, street railway

A street railway company which enjoys franchises and property rights within a drainage district is subject to a special assessment according to the benefits that it derives from the drainage improvement, and the omission of these property rights from an assessment invalidates the assessment.⁹⁵

3240 Omitted property, telegraph fixtures

The poles, wires and fixtures of telegraph companies cannot be assessed for drainage purposes.⁹⁶

⁹¹ *Ranney Refrigerator Co. v. Smith*, 157 Mich. 306.

⁹² *People v. Ryan*, 225 Ill. 359, 363 (1907).

⁹³ *Stack v. People*, 217 Ill. 220, 231 (1905).

⁹⁴ *Spring Creek Drainage District v. Elgin, Joliet & Eastern Ry. Co.*, 249 Ill. 291; Sec. 55, Levee act.

⁹⁵ *Spring Creek Drainage District v. Elgin, Joliet & Eastern Ry. Co.*, 249 Ill. 286, 291; Sec. 9, art. 9, Const. 1870 (Ill.); Sec. 55, Levee act as amended in 1885 and 1909; Sec. 34½, *Ibid.*

⁹⁶ *Spring Creek Drainage District v. Elgin, Joliet & Eastern Ry. Co.*, 249 Ill. 291; Sec. 55, Levee act.

3241 Ordinance, description

The omission to prescribe the depth of the sewer is fatal to a sewer ordinance upon application for confirmation.⁹⁷

3242 Organization, legality

The legality of the proceeding by which additional territory has been added to a municipality can be attacked only in a direct proceeding by *quo warranto*;⁹⁸ unless the orders attempting to organize the drainage district are absolutely void for want of jurisdiction. In the latter case the proceeding is subject to attack collaterally, or otherwise, whenever called in question.⁹⁹

3243 Petition, names of landowners

Unless a landowner, in contesting an assessment, has made objection that the petition for the formation of a drainage district did not state all of the names of the landowners, he cannot avail himself of the objection on appeal from a judgment confirming the assessment.¹⁰⁰

3244 Power, delegation

A municipality may, by ordinance, grant to another municipality the right to construct and maintain drainage within its streets.¹⁰¹

3245 Release

Drainage commissioners have no power to release from future or additional assessments, but they may fix by agreement or contract the amount to be paid in a pending assessment.¹⁰²

A judgment for damages is conclusive that they exceed all benefits to the land; for, if there are benefits and damages the benefits are necessarily taken into account in determining whether there is any balance of damages to be paid. Similarly a judgment for damages is conclusive against a subsequent proceeding to assess the same land for benefits. Likewise, a release

⁹⁷ Lawrenceville v. Hennessey, 244 Ill. 468.

⁹⁸ People v. York, 247 Ill. 594.

⁹⁹ People v. York, 247 Ill. 595.

¹⁰⁰ Sny Island Drainage District v. Shaw, 252 Ill. 142, 156 (1911).

¹⁰¹ Berwyn v. Berglund, 255 Ill. 498, 502 (1912).

¹⁰² Vandalia Drainage District v. Vandalia R. Co., 247 Ill. 123; Sec. 55, Levee act.

of the right of way to a municipality is a bar to any claim for damages as to the land released.¹⁰³

No assessment or re-assessment can be made upon lands which were not included in the release of the right of way until the question of compensation and damages has been determined; and the right to such compensation is not affected by the location of the ditch or by seeing the work done.¹⁰⁴

3246 Reversal

The reversal of a judgment of confirmation is not a reversal as to every tract of land embraced in the assessment, but affects only the tract of land which was involved in the writ of error.¹⁰⁵

3247 Spreading tax prematurely

The premature spreading of a drainage tax does not render the tax invalid.¹⁰⁶

3248 Territorial limits

The corporate authorities of cities, villages and towns have power, under the statute, to construct and maintain outlet sewage, and this power is not vested in the Sanitary District of Chicago.¹⁰⁷

3249 Forms (Ill.)

State of Illinois, }
..... county. } ss.

In the county court.

After term, 19..

In the matter of the assessment of benefits upon the lands included in the so-called drainage district, counties of and, state of Illinois.

The undersigned severally hereby object to the assessment of benefits herein extended against the respective tracts of land in said list opposite the names of the undersigned respectively, as made by the said, purporting to be commissioners of drainage district, and for grounds of objection say:

¹⁰³ Morgan Creek Drainage District v. Hawley, 255 Ill. 38.

¹⁰⁴ Morgan Creek Drainage District v. Hawley, *supra*.

¹⁰⁵ Morgan Creek Drainage District v. Hawley, 255 Ill. 37.

¹⁰⁶ Ranney Refrigerator Co. v. Smith, 157 Mich. 306.

¹⁰⁷ Berwyn v. Berglund, 255 Ill. 503.

1. There is in existence no such district as the drainage district; that said have no authority to act as commissioners of said so-called drainage district; that there was never filed with the clerk of the court a petition signed by a majority of the owners of land within the district as proposed to be organized who had arrived at lawful age; that the petition filed herein was signed by less than a majority of the landowners living in the proposed district; that is, it was signed by only and that of these withdrew their names from said petition before the court passed upon the same, and that there are landowners within the said proposed drainage district.

Objectors therefore say that this court was wholly without jurisdiction to appoint commissioners; that therefore such appointment and such action of the said so-called commissioners is wholly void and without authority of law.

2. The undersigned further object to the assessment of benefits by said so-called commissioners for the further reason that the statute provides that in case the court so orders the commissioners of said district may make any assessment of benefits or damages and benefits in lieu of a jury; and that such pretended assessment is in violation of the constitution of the state of Illinois, which provides that "Private property shall not be taken or damaged for public use, without the payment of damages, and that the value of land so taken or damaged shall be ascertained by a jury"; and as by the appointment in this case, it was the duty of the commissioners to ascertain damages and benefits, they could not legally ascertain damages until the same had been passed upon by a jury, or the landowners had released the right of way; that therefore the action of said commissioners in attempting to determine that there were no damages is void, and without authority of law, as objectors, not having released their right of way for said ditch, had a right to have the question of the value of land taken and damage to land not taken, passed upon by a jury, and in so far as said action of said commissioners affects the rights of objectors, their act is wholly void and their assessment should not be sustained.

3. Objectors further object to the confirmation of the report of the so-called drainage commissioners, because there is in fact no such drainage district as the drainage district, the said commissioners, purporting to act as such commissioners, have no authority to so act, because the record of this court purporting to create such drainage district and the order therein as required by section 5 of "the act to provide for the construction, reparation and protection of drainage districts, ditches and levees across the lands of others for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts," approved and in force May 29, 1879, fails to show that the petition required by said

act to be filed in said court was filed therein; and it also fails to show that this court had any jurisdiction to appoint said commissioners, or to make any order under such petition.

(Signatures)

VERDICT

3250 Jury

The assessment of benefits and damages, in a drainage assessment case, can only be made by a jury which has been specially selected and empaneled for that purpose.¹⁰⁸

3251 Verdict, requisites

It is permissible to assess and extend against the right of way of a railroad company in the district, the entire or total benefits, when the benefits assessed do not exceed the benefits to the whole right of way, although a particular part of the right of way, when taken by itself, would not be benefited.¹⁰⁹

3252 Verdict, form (Ill.)

(Caption)

We, the jury, find that the benefits which should be assessed to the lands, railroads and public highways to be affected by the proposed work and the damages to the lands taken or damaged thereby, over which the right of way for the construction of said proposed work has not been obtained, are, according to our best judgment, as set down in the roll of assessment of benefits and damages, marked "jury's assessment of benefits and damages" hereto attached and by reference thereto hereby made a part of this, our verdict; and in no case, according to our best judgment, has any tract of land been assessed by us for benefits in a greater amount than its proportionate share of the estimated cost of the work and expenses of the proceeding, nor in a greater amount than it will be benefited by the proposed work.

(Twelve signatures)

Jury's Assessment of Benefits and Damages

| Name of owners | Description of premises affected | Number of acres | Amount of benefits assessed | Amount of damages allowed |
|----------------|----------------------------------|-----------------|-----------------------------|---------------------------|
| | | | | |
| | | | | |
| | | | | |

¹⁰⁸ Moredock Drainage District v. Meyer, 253 Ill. 310; Secs. 17a and 17b, Levee act 1909.

¹⁰⁹ Cache River Drainage District v. Chicago & Eastern Illinois R. Co., 255 Ill. 401, 402.

All of the foregoing lands being in township, range of principal meridian, situated in the county of and state of Illinois.

And also the following lands in township (Insert same headings as above).

ORDERS AND JUDGMENTS

3253 Correcting and confirming

State of Illinois, }
 county. } ss.

In the county court of said county.

In *re* special drainage district in and counties and state of Illinois.

Whereas, we, the commissioners of said special drainage district in and counties and state of Illinois, did, on the day of, 19.., enter our order herein classifying all the lands in said district for the special assessment benefits to be conferred on said lands by the construction of the proposed ditch of said district, and we did also on said day of file in the office of the county clerk of said county our said order and table showing the classification of said lands so made by us; and

Whereas, we did in and by our order on said day fix the time and place for the hearing of any and all objections that might be made to our said classification, and that we fixed on the day of, 19.., at the hour of o'clock in thenoon as the time for hearing said objections (said day of being more than fifteen days from the date of the filing of said orders and table of classification with the said county clerk) and that we designated the county court house, in of in said county of, as the place of said meeting (said court house being the court house of the county in which said district is organized); and

Whereas,, county clerk of said county, and ex-officio clerk of said drainage district, pursuant to our said order fixing the time and place of this meeting and the statute in such cases made and provided, did thereupon sign and issue a notice of the time, place and purpose of said meeting, in words and figures following, to wit: (Insert notice), and cause said notice to be published in the, a weekly newspaper printed and published in said county of, having a general circulation therein, for at least two successive weeks, the first publication of which notice in said paper was at least more than fifteen days prior to the time

fixed in said notice for the hearing of said objections;¹¹⁰ and he did also cause said notice to be published likewise in the a weekly newspaper printed and published in said county of, also having a general circulation therein, for at least two successive weeks, the first publication of which notice in said was also at least more than fifteen days prior to the time fixed in said notice for the hearing of said objections, as aforesaid; and he filed in said court on said ... day of, 19.., his certificate of such publication, to which certificate reference is hereby made and the same is hereby adopted and made a part hereof; and

Whereas, on said day of, 19.., at the said county court house in the of in said county of we, the said commissioners, did meet and hear all objections urged by all persons in interest in said classification; and said hearing not being completed by the evening of said day, we did thereupon adjourn said meeting to the day of, 19.., at the hour of o'clock at said court house, and at the time of said adjournment we made due announcement of the time and place thereof by public proclamation; and on the said day of, 19.., at the hour of o'clock in noon at said court house in said of we again convened and continued to hear any and all objections that were urged to our said classification by all persons in interest; and that by the evening of said day of, 19.., all the objections urged by the persons in interest were fully heard and considered and no other person appeared in response to the public announcement thereof to urge any other and further objection to said classification than those previously made. That on said day of, 19.., there appeared before us personally the following owners of land in said district, namely and, guardian *ad litem* by appointment of the county court of said county of all insane, distracted and minor persons interested in the land lying within said special drainage district, and who, each, severally made objection to our said classification of the lands respectively owned by him or in which he is interested; and all the objections made by each and every such person having been fully heard and considered (no other person than those above enumerated being present at said meeting objecting to our said classification), and full and complete opportunity having been given to each and every person to make objection to our said classification of their lands and to be heard on the same:

Now, therefore, we the commissioners as aforesaid, after

¹¹⁰ If the district is to extend to another county insert matter included within stars.

hearing of said objections and on full consideration of the same being convinced that injustice has been done in the following instances, we have, and hereby do correct the same in accordance with justice and right, and the following classification as heretofore made by us have been and hereby are accordingly corrected, as follows, namely, the last column of figures in the following table and which column bears the heading "corrected classification" shows the classification of the several tracts of land set opposite such figures as corrected by us at this hearing.

Description of Lands

| Subdivision of section | Section | Township | Range | Original classification | Corrected classification |
|---------------------------|---------|----------|-------|----------------------------|-----------------------------|
| | | | | | |
| | | | | | |
| | | | | | |

Lands in county, Illinois.

(The lands of involved herein do not appear in said list.)

We have indicated said changes in our said table and classification filed with said county clerk on by crossing out the original numbers and by writing to the right thereof in red ink the figures and words indicating the classification as corrected.

And now being of the opinion that our said classification of the lands in said district as originally made by us and as corrected in the instances above mentioned, is now in accordance with the right and justice of the matter, we do hereby in all things confirm the same.

Dated.....

.....
.....
.....

Commissioners of the special
drainage district in
and counties and
state of Illinois.

Attest:

.....
County clerk of said
county and ex-officio clerk of
said drainage district.

3254 Confirming**(Caption)**

The cause coming on to be heard by the jury empaneled in said cause for the hearing upon all questions of benefits and damages to any of the lands in said drainage district and all objections filed herein; and it appearing to the court that the commissioners of said drainage district reported to this court on the day of, 19.., that they, under the direction and order of this court, had secured from all the owners of land, over, upon and across which the ditch proposed to be constructed in said district had been surveyed and located and will be constructed, releases in writing of the right of way of said proposed ditch and of any and all claims for damages, which report was approved by this court; and it further appearing to the court that the commissioners of said district filed their roll of assessment of benefits and damages with the clerk of said court on the day of, 19.., and that said commissioners gave due and timely notice to all persons interested, as provided by statute, that they had fixed upon the day of, 19.., at o'clock noon as the time when, and the county court room in the court house in said county, before the county court of said county, as the place where, they would appear for the purpose of having a jury empaneled in accordance with the provisions of section 6 of an act entitled "An act to provide for the exercise of the right of eminent domain," approved April 10, 1872, in force July 1, 1872, and for the hearing before said jury upon all questions of benefits and damages to any of the land in said district; and it further appearing to the court that the said commissioners gave notice by causing two copies of the same to be posted on the bulletin board at the door of the court house in, Illinois, on the day of, 19.., and by causing eleven copies of said notice to be posted on the day of, 19.., in eleven of the most public places within the boundaries of the said drainage district; and it further appearing to the said court that said notice was published once a week for two consecutive weeks in the daily newspaper of general circulation published in the city of, county of and state of Illinois, the first publication having been made on the day of, and the last publication on the day of; and it further appearing to the court that a copy of said notice was sent by mail on the day of, 19.., being within three days after the first publication thereof, by the clerk of said county court to the, being the nonresident landowners and their post-office addresses named in the affidavit filed as to nonresidence;

And certain landowners in said district having filed objec-

tions to the said proceedings and all landowners not objecting having been defaulted and the jury in said cause having been empaneled and sworn as is provided by law, and said cause and the arguments of counsel having been heard, and the court having instructed the jury as to the law and as to the form of their verdict, and the said jury having elected a foreman and a clerk from said jury, and in charge of such foreman having proceeded to examine the land, railroads and public highways to be affected by the proposed work, and the said jury having completed their verdict and filed the same in this court:

Now, therefore, the court doth order that said verdict be and the same is hereby confirmed; and it is further considered and adjudged by the court that the said drainage district recover of and from the following described tracts and parcels of land an assessment of benefits equal to the amount of money written opposite to each of said tracts or parcels of land.

| Name of owners | Description of premises affected | Number of acres | Amount of benefits assessed | Amount of damages allowed |
|----------------|----------------------------------|-----------------|-----------------------------|---------------------------|
| | | | | |
| | | | | |

And the court doth further order that the clerk of said court shall spread said verdict and judgment upon the records of said court and such a judgment and verdict shall be a lien upon said lands for said judgment until paid.

.....
County Judge.

3255 Default and confirmation

(Caption)

On this day of, 19.., come the parties herein, by their respective attorneys, and now this cause coming on to be heard upon the assessment roll filed herein; it is ordered that the time to file objections be extended to, 19.. And now this cause further coming on to be heard, and the court having heard the evidence and the arguments of counsel, and being fully advised in the premises, it is ordered that the leave heretofore given to file objections herein be rescinded by consent. And now it appearing to the court that the commissioners heretofore appointed to make said assessment have complied with all of the requirements of the law as to posting and sending notices to the owners of the property assessed, and that due notice has been given, as required by law, of the application and of the making and return of the said assessment, and of the time for the final hearing thereon, and no objection to said assessment having been filed, and no defense thereunto made, it is ordered and adjudged by the court that a

default be and is hereby entered against each and all of the lots, blocks, tracts and parcels of land assessed and described in the said assessment for said improvement, returned and filed in this court, and that said assessment and all proceedings therein be and the same are hereby confirmed, and that the clerk of this court certify the assessment roll, returned by said commissioners, together with this judgment, to the person authorized to collect the same, as required by law. And it is further ordered that this cause be continued until the next term of this court.

3256 Exceptions, practice

In case all of the objections to a drainage assessment are overruled and a judgment of confirmation is entered, an exception must be taken to the action of the court if it is sought to be reviewed on appeal or error. Where no such an exception is taken the judgment of confirmation can be questioned only for errors which appear on the face of the record.¹¹¹

APPEAL AND ERROR

3257 Drainage organization, quo warranto

An order organizing a drainage district under the Illinois Levee act is final, appealable and reviewable on appeal or writ of error.¹¹²

The refusal to grant leave to file an information in the nature of *quo warranto* will not bar the right to have drainage proceedings reviewed upon writ of error brought within the statutory period.¹¹³

3258 Drainage assessment

In an assessment proceeding for drainage purposes an appeal or error lies only from the order of the confirmation of the assessment.¹¹⁴

No appeal or error lies from an order vacating previous orders entered in the proceeding.¹¹⁵

¹¹¹ Schafer v. Gerbers, 234 Ill. 469.

¹¹² Drummer Creek Drainage District v. Roth, 244 Ill. 70; Sec. 16. Law 1909, obviating Damon v. Barker, 239 Ill. 637 (1909).

¹¹³ Aldridge v. Clear Creek Drainage District, 253 Ill. 257.

¹¹⁴ Union Drainage District v. Milligan, 227 Ill. 303, 306 (1907); Schafer v. Gerbers, 234 Ill. 473; Sec. 123, c. 37, Rev. Stat. Ill.

¹¹⁵ Lacey Drainage District v. Langellier, 215 Ill. 274, 275; Mack v. Polecat Drainage District, 216 Ill. 63.

3259 Jurisdiction, drainage commissioners

An appeal from a classification of drainage commissioners may be taken to the county court, and from that court to the circuit court, and no further appeal is permissible. Statutes which permit appeals from non-judicial boards and bodies are valid when the subject matter involves some personal or property right that is subject to judicial determination. In making a classification of lands of a district, the drainage commissioners directly deal with valuable property rights of which courts, in the exercise of their general judicial powers, take jurisdiction.¹¹⁶

An appeal to the county court from the decision of the commissioners upon the rating or classification of the lands for drainage purposes can only be taken by property owners who appear and urge objections before the commissioners; and no appeal can be prosecuted by a party who appears and objects but subsequently withdraws the objections before the commissioners render their decision.¹¹⁷

In a proceeding for a new classification, an appeal may be taken to the county court from the commissioners' decision upon objections by filing an appeal bond with the county clerk within ten days of the commissioners' decision.¹¹⁸

The appeal bond must be approved by the county clerk.¹¹⁹

3260 Jurisdiction, city and county courts

In an appeal by parties who object to the rating of the land because it is too high, or to the rating of the land of another on the ground that it is too low, the county court's jurisdiction is confined to a determination of the correctness of the classification of the land for which objection has been made and none other.¹²⁰ Only such objections can be raised and tried in the county court as were raised and tried before the drainage commissioners, the jurisdiction of such court and jury being merely corrective of the errors that have been committed by the commissioners in overruling objections filed before them.¹²¹

¹¹⁶ Rowand v. Little Vermillion Drainage District, 254 Ill. 543, 547 (1912); Secs. 24, 25, Farm Drainage act (Hurd's Stat. 1911, p. 907); Drainage Commissioners v. McNulta, 242 Ill. 461, 466 (1909).

¹¹⁷ Carr v. People, 224 Ill. 160, 166 (1906).

¹¹⁸ Rowand v. Little Vermillion Drainage District, 254 Ill. 544; Sec. 24, Farm Drainage act.

¹¹⁹ Drainage Commissioners v. McNulta, *supra*.

¹²⁰ Carr v. People, *supra*.

¹²¹ People v. Green, 242 Ill. 455, 459 (1909).

An appeal from an order of the county court organizing a drainage district under the Farm Drainage act can be taken only to the circuit court.¹²²

3261 Jurisdiction, scope

An appeal from a classification of a drainage assessment merely confers jurisdiction upon the county or circuit court to which the appeal is taken and the jury to correct the errors, if any, that might have been committed by the commissioners, and does not vacate the classification nor deprive the commissioners of the power to assess the land involved before a final disposition of the appeal.¹²³

3262 Bond on appeal to county court

Know all men by these presents, that I, the undersigned, and, of the county of and state of Illinois, are firmly held and bound unto the of the counties of, in the state of Illinois.

The condition of this obligation is such, that whereas, the said is the owner of (Insert description) in county, Illinois, against which said lands the drainage commissioners of said of the counties of, in the state of Illinois, have confirmed a classification for certain improvements about to be made in said drainage district over the objection of said, who appeared and urged objections at the meeting of said commissioners held for the purpose of hearing such objections to said classification; and, whereas, said is not satisfied with the decision of the commissioners in confirming the classification of his said lands, and desires to appeal therefrom to the county court of said county:

Now, if said shall pay to said drainage district such tax as may be levied upon the lands in question, and all costs occasioned by said appeal in case said order of said commissioners shall be affirmed, then this obligation shall be null and void; otherwise to remain in full force and effect.

Dated, etc.

(Signatures and seals)

Filed and approved, 19..

3263 Bond on appeal to supreme court

¹²⁴ The condition of this obligation is such, that whereas, the said drainage district, of the counties of,

¹²² Meyers v. Newcomb Drainage District, 245 Ill. 140 (1910); Sec. 122, County Court act (Hurd's Stat. 1911, p. 698).

¹²³ People v. Grace, 237 Ill. 265, 267, 268 (1908).

¹²⁴ Precede this by usual obligation.

in the state of Illinois, did, on the day of, 19.., obtain an order or judgment against the above bounden dismissing the appeal by him taken from the classification of the commissioners in the aforesaid drainage district, and for costs of suit, from which order and judgment the said has prayed an appeal to the supreme court of the state of Illinois:

Now, if the said shall prosecute his said appeal with effect, and pay whatever judgment may be rendered against him by said court upon the trial of said appeal, or in case the appeal is dismissed, and all costs that have been made before said county court, and all costs occasioned by said appeal, then the above obligation to be void; otherwise to remain in full force and effect.

(Signatures and seals)

Approved this day of, 19..

....., Judge.

3264 Supersedeas bond, power of attorney

Know all men by these presents, that we have severally and respectively made, constituted and appointed and by these presents do severally and respectively make, constitute and appoint and or any one of them our true and lawful attorney, for us and in our names and places, to execute and deliver any bond which may be required for the making the writ of error a *supersedeas*, which writ of error is about to be sued out by us from the supreme court of the state of Illinois, for the reversal of a judgment of the court of the county of, in said state of Illinois, obtained by the district, at the term, 19.., of said court, confirming the assessment roll in the matter of the petition for the organization of the district and for the assessment of the benefits and damages, hereby ratifying and confirming all things which our said attorneys may lawfully do in the premises.

Witness our hands and seals this day of, 19..

(Signatures and seals)

3265 Supersedeas bond

¹²⁴ The condition of the above obligation is such, that whereas, the above bounden have sued out of the supreme court of the state of Illinois, a writ of error to reverse the judgment of the court of county, Illinois, rendered at the term, 19.., of said court, in the matter of the petition for the organization of district and for the assessment of damages and benefits, confirming the assessment roll filed in said court; and whereas said writ of error has been made a *supersedeas*;

Now, if the said plaintiffs in error shall prosecute their said writ with effect and shall moreover pay all such damages and costs as may be awarded against them in case the said judgment is affirmed, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signatures and seals)

Sureties' Affidavit

State of Illinois, }
 county. } ss.

..... and, being duly sworn, do severally depose and say that they are and each of them is the owner of real and personal property to the amount of more than dollars over and above all their respective liabilities and statutory exemptions, and that they are both residents of county, Illinois.

(Signatures)

Subscribed, etc.

NEW ASSESSMENT

3266 Objections; accounts, itemizing, practice

The insufficiency in the itemization of the accounts should be met by motion to make a more specific statement of the accounts, and not by an objection.¹²⁵

3267 Objections, costs of collection

In a levy for drainage purposes, it is proper to include the cost of collection of delinquent taxes.¹²⁶

3268 Objections, diversion of funds

In the expenditure of funds drainage commissioners are not limited to the particular purpose that is specified in the estimate upon which the assessment is based, but they may use the money arising from the collection of assessments for any legitimate purpose of the district, under the direction or subject to the approval of the court.¹²⁷

¹²⁵ Spring Creek Drainage District v. Elgin, Joliet & Eastern Ry. Co., 249 Ill. 279.

¹²⁶ Spring Creek Drainage District v. Elgin, Joliet & Eastern Ry. Co., 249 Ill. 278; Sec. 21, Fees and Salaries act (Ill.).

¹²⁷ Spring Creek Drainage District v. Elgin, Joliet & Eastern Ry. Co., 249 Ill. 276, 277; Sec. 37, Levee act.

ADDITIONAL DRAINAGE ASSESSMENT

3269 Additional assessment, incurred obligations

Formerly, an additional or second assessment could be made only to raise money for the payment of future obligation, or for payment of necessary incidental expenses incurred in the preliminary work of preparing, spreading and levying the assessment; it could not be made to cover general obligations already incurred.¹²⁸

Under present statute, the commissioners are authorized to levy a special assessment to meet any continuing, regular expenditures in connection with the carrying on of the business of the drainage district, such as *per diem* allowed drainage commissioners, attorneys' fees and court costs.¹²⁹

A levy may be made for work that has been done under a previous levy for repairs when some unexpected shortage or deficiency exists in the estimated amount, as those arising from changes in the rate of wages or cost of material. An attorney's fee is improperly included in the commissioners' statement for repairs as a basis of such a levy.¹³⁰

3270 Additional assessment, amount

A drainage district may raise by special assessment any amount which equals the benefits, regardless of the probable aggregate amount of benefits which has been found by the commissioners in their preliminary report under section 9 of the Levee act, as the commissioners' report is merely advisory and is not made to fix the benefits for future assessments.¹³¹

3271 Jurisdiction

A justice of the peace in Illinois has no jurisdiction in a proceeding for an additional drainage assessment where the cost of the contemplated improvement exceeds the statutory limit of two thousand dollars.¹³²

¹²⁸ Vandalia Drainage District v. Hutchins, 234 Ill. 35.

¹²⁹ Meridian Line Drainage District v. Wiss, 258 Ill. 600, 602 (1913); Sec. 37, Levee act as amended in 1909.

¹³⁰ People v. Brown, 253 Ill. 578,

583 (1912); Sec. 70, Farm Drainage act (Ill.).

¹³¹ Sny Island Drainage District v. Shaw, 252 Ill. 148; Sec. 9, Levee act (Hurd's Stat. 1909, p. 859).

¹³² Frank v. Rogers, 220 Ill. 206, 214 (1906).

PETITIONS

3272 Landowners' petition

State of Illinois, }
 county. } ss.

In the county court thereof
 term, 19..

In the matter of drainage district No.
 of and counties.

To the commissioners of said drainage district No.,
 of counties:

The undersigned petitioners, being twenty-five per cent of the persons landowners and parties paying assessments in said district, respectfully represent that the main channel or ditch of said district empties into what is commonly known as creek, in said county; that from the point where said ditch empties into said creek, through the lands of the estate of and the lands of, there is but little, if any, fall, and especially for a space of about rods where said ditch crosses the line between the farms of said and the estate of, the said creek is completely dammed up and filled in on account of a growth of willows therein, which results in backing up the water upon said district, and thereby causing great damages to the lands in said district.

The undersigned petitioners further represent that it is necessary that said creek, below the point where said drainage ditch empties into the same and at the point above suggested, be opened and cleaned out.

The undersigned, therefore, petition your honorable body to proceed to make such improvements of said creek as above suggested, and at such expense as may be reasonable and necessary therefor.

Dated, etc.

(Landowners' signatures)

b

We, the undersigned landowners in drainage district of the towns of and, in the county of, and state of Illinois, most respectfully petition the commissioners of said drainage district to proceed at once to clean out and deepen and enlarge the main ditch and all the lateral ditches in said district, in such a way as to thoroughly drain all the lands in said district, and that the same be done by special assessment levied upon lands in said district in proportion to the original assessments, so far as the same are just and right.

Dated, etc.

(Signatures of owners)

3273 Resolution

In the matter of the special drainage district.

Whereas, the undersigned, the commissioners of said drainage district, do find that the amount of the assessment heretofore levied for the purpose of constructing a system of drainage of said district is inadequate to complete said work and that there is a deficit of dollars and cents to pay for the work of constructing the middle and lower sections of the "main ditch" of said district, for work already done; and

Whereas, the commissioners do further find that the sum of dollars over and above the levies heretofore made and the deficit found as above for work previously executed is reasonably necessary for the purpose of completing the construction of the original system of drainage as heretofore adopted; and

Whereas, the commissioners further find that the sum of dollars and cents is likewise reasonably necessary for the purpose of constructing an additional lateral ditch to be known as the "space ditch" in said drainage district in accordance with their order heretofore entered herein; and

Whereas, the commissioners had further found that the sum of dollars and cents is likewise reasonably necessary for constructing an additional lateral ditch in said district to be known as the "space ditch" in accordance with their order heretofore entered herein;

Now, therefore, be it hereby resolved that a total levy in the sum of dollars and cents be and the same is hereby made and levied against the lands, properties and townships of said special drainage district for the purposes aforesaid: and

We do, therefore, hereby certify that there is required the sum of dollars and cents to be levied as a special assessment or tax for drainage purposes on the lands, properties and townships benefited in said special drainage district in said and counties and state of Illinois; and the same is hereby levied accordingly.

The clerk of said district is, therefore, hereby directed to compute and apportion said amount thus levied among the tracts of land, properties in townships in said district in the names of the owners when known according to acreage of each and its figure of classification on the graduated scale, so that each tract may bear its burden in proportion to benefits, according to the statute in such case made and provided.

Given under our hands this day of, 19..

.....

Commissioners as aforesaid.

3274 Commissioners' petition, requisites

In Illinois proceedings for the levying of an additional drainage assessment must be commenced by the filing of a commissioners' petition in conformity with the statute.¹³³

An additional assessment or assessments may be levied upon the petition of commissioners, when it is made to appear that the moneys theretofore raised by assessment had been expended or were inadequate or were insufficient for maintenance or repairs, or where it is necessary that more money be raised to pay for additional work or for the completion of work that has been already commenced.¹³⁴

It is proper, under Michigan practice, to include in one proceeding the widening and deepening of two drains, provided the petition is signed by one or more of the freeholders who are assessed for the construction of each of the drains.¹³⁵

The description, in a petition for a drain, is sufficient if it gives a general description of the beginning, the route, and the termini of the proposed drain.¹³⁶

3275 Commissioners' petition (Ill.)

State of Illinois, }
..... county. }ss.

Before, esquire, justice of the peace in and for said county.

We, the undersigned commissioners of drainage district number, of the towns of and, county, Illinois, do hereby report that immediately following the organization of said district, the drainage commissioners of said district did upon the day of, 19.., submit their report to, esquire, a justice of the peace of said town of, reporting, among other things, the starting point, route and termini of a proposed ditch in said drainage district, upon a route therein described to be known in this petition as the main ditch. Which starting point, route and termini will be found upon pages, and of the records of said district which are hereby made a part of this report.

That in said report it was shown that the construction of said ditch would require the removal of about cubic

¹³³ Frank v. Rogers, 220 Ill. 210; Secs. 3, 37, c. 42, Hurd's Stat. 1903, pp. 716, 726.

¹³⁴ Sny Island Drainage District v. Shaw, 252 Ill. 150; Sec. 37, Levee act (Ill.).

¹³⁵ Tinsman v. Probate Judge, 82 Mich. 564.

¹³⁶ Ranney Refrigerator Co. v. Smith, 157 Mich. 304.

yards of earth, at a cost, including the right of way and incidental expenses, of dollars; and that the probable annual expenses of keeping the same in repair would be the sum of dollars.

That on, to wit, upon the day of, 19.., the said commissioners filed their plans and specifications for the construction of the said main ditch and made such plans and specifications a part of their said report; which plans and specifications are recorded upon pages, of the records of said district, and are hereby made a part of this report.

That on, to wit, upon the day of, 19.., the said, esquire, the justice of the peace, before whom said district was organized, did confirm said report of the commissioners above mentioned, in all respects; which order confirming said commissioners' report may be found on pages and of the records of said district.

That on, to wit, the day of, 19.., a venire was issued by said justice of the peace for twelve men to compose a jury to make assessments of benefits upon the lands in said district; which venire was given to constable to serve, returnable, 19..

That on, 19.., said venire was returned with the names of twelve disinterested freeholders of said county, who were sworn and was chosen foreman; that said jurors having made their assessments of benefits and damages which were sustained or did accrue to the lands to be affected by the proposed work, returned their assessment roll into court; which assessment roll is recorded on pages of the records of said district, and which assessment roll is a part of this report. By which assessment roll the sum of dollars was assessed against the lands in said district.

That, one of the board of commissioners of said district, was appointed collector for said district, 19.., and proceeded to the collection of the special assessment last mentioned, after entering into bond as required by law; that after making said collection, said paid the same out for the construction of the main ditch in said district, for right of way, and for engineering, attorney's fees, and other necessary and incidental expenses in and about the business of said district to an amount equal to dollars, as shown upon pages and of the records of this district, leaving the sum in his hands of dollars.

That afterwards, to wit, for the purpose of a more thorough drainage of the lands in said district, the said, esquire, the justice of the peace before whom the proceedings in said district was had, caused an assessment of dollars to be levied for the construction of lateral ditch number; also an assessment of dollars for the construction of lateral ditch number; and an assessment of

dollars for the construction of lateral ditch number; and also an assessment of dollars for the construction of sub-lateral number of lateral number; all in said district, amounting in the aggregate, to the sum of dollars; which assessment was confirmed by said, esquire, justice of the peace, 19.., and which assessment was duly collected by the collector of said district, and paid out for the purposes of constructing and improving said ditches last mentioned and for incidental expenses necessary thereto. An itemized statement of which appears at page of the records of said district, which page is made a part of this report.

That on, to wit, the day of, 19.., the court caused another assessment to be levied for the purpose of completing the work in said drainage district; which assessment amounting to the sum of dollars and of interest was afterwards collected by, treasurer of said district, and paid out for the purpose for which the same was levied. An itemized statement of the moneys so paid out appears upon pages and of the treasurer's book, which is made a part of this report.

That all of said moneys have been paid out for the purposes aforesaid except the sum of dollars, which now remains in the hands of the treasurer; that there are outstanding claims against said district aggregating about the sum of dollars, consisting of engineer's fees, attorney's fees, commissioners' services, labor, surveyor's stakes and printer's fees, all of which have recently been incurred in ascertaining the condition of the ditches in said district and in making surveys thereof and in giving notices of this meeting and in preparing reports and petition herewith presented.

That all the ditches in said district are badly out of repair and do not properly drain the lands of said district; that the main ditch is entirely inadequate in size and dimensions to carry off the waters of said district; that it never was of sufficient depth to properly drain the lands of said district; that it needs to be deepened to an average depth of about feet in order to furnish a proper outlet for the waters of said district; and that its original width of bottom if carried to the depth indicated would undoubtedly furnish sufficient capacity to carry all the waters of the district and thus furnish ample outlet for the drainage of all the lands in the district.

That the right of way has already been secured for all of the ditches in said district, and that it would save a large amount of money to the district to have all future assessments of benefits made by the commissioners instead of a jury.

The undersigned would therefore petition your honor to enter an order authorizing the commissioners of said district to levy an additional assessment on the lands of said district for the

purpose of cleaning out, deepening, enlarging and finishing the ditches in said district, of an amount equal to the sum of dollars to be used for the purpose aforesaid; to authorize said commissioners to levy and apportion said assessment upon the lands of said district in place of a jury; and to issue an order authorizing and empowering said commissioners to proceed without unreasonable delay to repair, enlarge and improve the ditches and drains in said district.

Appended hereto is an itemized statement of account made by the commissioners of said district under oath showing the moneys received by the district and the manner in which they have been expended, together with estimates of the cost of the work necessary to be done upon the ditches in said district, reference being had to the original maps and profiles to be found among the papers of said district.

| | | |
|---------------------------------------|---|-------|
| Drainage commissioners ¹³⁷ | { | |
| | { | |
| | { | |

b

(Caption)

The undersigned, commissioners of the aforesaid district, would respectfully represent, that, at the term of this court, 19.., an assessment was spread upon the lands of said district for the purpose of raising a fund to repair and maintain the system of drainage as shown by the records of this court; that subsequent to said time no other assessments have been made; that there is now on hand, for the purpose of repairing and maintaining said system, dollars, as shown by their report and the report of the treasurer of said district, heretofore filed in this court and approved on the day of, 19.., and to which report for an itemized statement and general account of the finances of said district, reference is hereby made; that no further work has been done nor moneys expended since the filing of said report, and which report and itemized statement, as so approved and on record in this court, are hereby made, and to be considered, a part of this petition.

The undersigned would further report that a petition, signed by more than twenty-five per cent of the persons paying assessments in said district, has been filed and presented to them, requesting that certain improvements be made in the outlet of said drainage system outside of said district, and in the lands of the estate of, a copy of which petition is hereto attached, and to which, for contents thereof, reference is hereby made; that, subsequent to the year 19.., no repairs have been made or work done for the purpose of

¹³⁷ Add verification.

maintaining and keeping said drainage system in proper condition; that the undersigned commissioners have examined said drainage system throughout its entire course, and find, that, in order to repair and maintain said district to such an extent that it will be of practical benefit and value to the lands contained therein, it is necessary to clean out and improve the ditch or creek into which said drainage system empties at several places where the same crosses the lands of said and the estate of, that the main ditch of said drainage system is a continuation of what is known as creek, and that said creek is the outlet for said main ditch; that in the lands of said estate of and of, said creek has become practically filled with a growth of willows and otherwise so obstructed that the water is dammed up and does not readily flow away from the lower terminus or mouth of said drainage system, and the benefits of said drainage system are thereby greatly decreased and the lands comprising said district are greatly damaged; that if said willows and other obstructions were removed, a strong current would be created in said drainage system and creek, which would, to a large extent, maintain the proper depth of said ditch and creek, and thus afford a proper outlet for the drainage system of said district.

The undersigned commissioners would further represent, that the main ditch of said drainage system has become obstructed by certain willows and refuse matter in the lands of and that it is necessary that all of said obstructions be removed; that in the lands of there is a sharp curve in said main ditch, on account of which the banks of said ditch are becoming washed away and said ditch has become filled below said curve, and the water thereby obstructed; and that it is for the best interest of said district that said main ditch be straightened at said point.

The undersigned commissioners would further represent, that, unless the aforesaid improvements, repairs and changes are made as above suggested, great damage will result to the property owners of the central and lower portions of said district; that it is necessary for said repairs, improvements and changes to be made forthwith in order that the spring floods may be properly carried away, it being possible to repair said ditch only during the fall months of the year when the water is low and the country generally dry; and that said repairs, improvements and changes will greatly benefit all the lands of said district, and the cost thereof should be charged against and spread over all the lands of said district.

The undersigned commissioners would further represent, that the estimated cost of such repairs, improvements and changes, incidental expense and the cost of the proceedings therefor,

will be dollars; that there is now a debt of about dollars for repairs outstanding against said district, and it is necessary that an assessment of dollars be spread upon the lands of said district for the purpose of making the repairs, changes and improvements aforesaid; that none of the lands of said district will be damaged by the proposed work; that the aggregate benefits will many times exceed the cost of such repairs, improvements and changes, including all costs of this proceeding; and that the survey and maps now on file in this court will be sufficient for the purpose of the work set forth in this petition.

Wherefore, your petitioners pray that an order of this court may be entered instructing and authorizing the undersigned, as such commissioners of drainage district No. counties, to forthwith cause the said repairs, improvements and changes to be made, and to spread an assessment on the lands comprising said district for the purpose of collecting and securing said sum of dollars; and that the undersigned may have such other and further relief in the premises as this cause may require.

All of which is respectfully submitted.

.....

Commissioners.

(Verification by all commissioners)

3276 Itemized statement of account

Estimate of work to be done in order to thoroughly drain all the lands in said district.

Main Ditch

To deepen and enlarge the main ditch as it now exists in said district so that the same shall be of an average depth of feet with slope of banks feet horizontally to each perpendicular foot end of a width of eight feet on the bottom from the west end to the center line of the town of, and feet wide for the balance of the distance, will require the removal of approximately cubic yards of earth at a cost approximately cents per cubic yard, amounting in all to dollars.

Lateral No. 1

To clean out and improve lateral No. 1, so as to put the same in good repair and of the same size as originally constructed, and foot deeper than when first constructed,

will require the removal of approximately cubic yards of earth at a cost approximately cents per cubic yard, amounting in all to dollars.

(Proceed in the same way with all subsequent laterals and sub-laterals)

| Totals - | |
|---------------------|-----------|
| Cubic yards | Estimated |
| Main ditch | \$..... |
| Lateral No. 1 | |
| Total | \$..... |

Report of commissioners of drainage district number of the towns of and, in the county of and state of Illinois.

....., 19...

Itemized statement showing money received by the district.

| (Date) | (Name) | \$..... |
|--------|--------|---------|
| | | |
| | Total | \$..... |

Itemized statement showing the manner in which the same has been expended.

| (Date) | (Name and character of work or services) | \$..... |
|--------|--|---------|
| | | |
| | Total | \$..... |

(Venue)

..... and being each duly sworn on their oath say that the foregoing is a true and correct statement of all moneys received by said district and the manner in which the same has been expended.

(Three signatures)

Subscribed, etc.

NOTICE

3277 Affidavit of nonresidence, amendment

An affidavit of nonresidence is amendable.¹³⁸

¹³⁸ *Sny Island Drainage District v. Shaw*, 252 Ill. 156; Sec. 4, Levee act (Ill.).

3273 Notice, requisites

A notice of a new drainage assessment must contain all of the statutory requirements, and it must be signed by the justice before whom the petition is filed.¹³⁹

The notice must be given after, and not before, the filing of the commissioner's petition for such assessment.¹⁴⁰

3279 Notice, form (Ill.)

To all persons interested:

Public notice is hereby given, that on the day of, 19.., at the hour ofM., the drainage commissioners of drainage district number, of the townships of and, in the county of and state of Illinois, bounded as follows (Insert the boundaries of said district), will present their petition to, esquire, a justice of the peace in and for said county, at his office in, in said town of, for an order to repair, enlarge and improve the ditches and drains in said district (State the starting point, route, termini and general description of the proposed work) and to levy an additional assessment upon the lands in said district to secure funds to carry on the said improvements and to keep the same in repair, and for an order requiring the commissioners of said district to make the assessments of benefits and damages in lieu of a jury; when and where all persons interested may appear and be heard if they see fit.

Dated, etc.

.....
Justice of the Peace.

3280 Publication

In a proceeding for an additional drainage assessment two weeks' publication of notice under section 37 of the Drainage act is sufficient, although section 3 of said act apparently provides for the giving of a three weeks' notice, because the latter section relates to the mode of giving notice and not to the time the same is to run.¹⁴¹

¹³⁹ Frank v. Rogers, 220 Ill. 211.

¹⁴⁰ Frank v. Rogers, 220 Ill. 210;
Sec. 3, c. 42, Hurd's Stat. 1903, p. 716.

¹⁴¹ Stack v. People, 217 Ill. 228.

ASSESSMENT

3281 Order authorizing

(Caption)

And now on this day of, 19.., come the drainage commissioners of drainage district number of the towns of and, county, Illinois, and present their petition, accompanied by an itemized statement of accounts made by the said commissioners under oath showing the moneys received by the district and the manner in which the same have been expended, asking among other things that said justice enter an order authorizing the commissioners of said district to levy an additional assessment on the lands of said district for the purpose of cleaning out, deepening, enlarging and finishing the ditches in said district of an amount equal to the sum of dollars to be used for the purposes aforesaid, to authorize said commissioners to levy and apportion said assessment upon the lands of said district in place of a jury, and to issue an order authorizing and empowering said commissioners to proceed without unreasonable delay to repair, enlarge and improve the ditches and drains in said district; and the landowners of said district having this day presented their petition signed by a majority of the owners of lands within said district, who are of lawful age and who represent more than one-third in area of the lands in said district, asking that the commissioners of said district proceed at once to clean out and deepen and enlarge the main ditch and all lateral ditches in said district in such a way as to thoroughly drain all the lands in said district and that the same be done by special assessment levied upon the lands in said district in proportion to the original assessments so far as the same is just; which petitions are recorded in the record of this district at pages to, inclusive, and upon pages and, respectively.

And it appearing to said justice that due notice of the presentation of the petition of said commissioners was given in the manner and for the length of time required by law; and that all previous assessments have been expended; and it further appearing from the petition and report of said commissioners and the maps and profile and estimates on file among the papers of said district, that the ditches in said district are insufficient to properly drain the lands of said district, and that in order to properly drain the same it will require the removal of approximately cubic yards of earth at a cost of approximately the sum of dollars, including the expense of levying an assessment; and it further appearing from an expression made by the landowners this day present that of said landowners were in favor of having an assessment levied by the commissioners of said district, and that of said land-

owners were in favor of having said assessment levied by a jury : and it appearing to the court that an assessment could be levied at much less expense by the commissioners than by a jury :

And it appearing to the court that an assessment could be levied at much less expense by the commissioners than by a jury :

It is therefore ordered that an additional assessment for the sum of dollars be levied on the lands within said district for the construction of the work mentioned in the petition and report of said commissioners and said land owners.

And it further appearing that the right of way has been secured for all the ditches within said district, it is therefore ordered that the commissioners are hereby authorized and ordered to make and spread said special assessment upon the land of said district in lieu of a jury.

.....
Justice of the Peace.

b

(Caption)

And now on this day comes the petitioners, by, their attorney, the landowner,, appearing by, his attorney; and thereupon this cause coming on to be heard upon the petition herein, and the answers or objections thereto on the part of said, and the court being fully advised in the premises, on consideration thereof, doth find, that the petitioners in this cause are the duly authorized and qualified commissioners of said drainage district No. counties; that they have filed their petition in this court, in this cause, on the day of, 19.., praying that an order of this court may be entered instructing and authorizing them, as such commissioners of said district, to spread an assessment on the lands comprising said district for the purpose of collecting and securing the sum of dollars, to be used and applied in the improvement of said district and in the repairing and improvement of the outlet of said district outside the boundaries thereof.

And the court doth further find that prior to the filing of said petition in this court, a petition was filed with said commissioners of said district, signed by more than twenty-five per cent of the persons owning lands in said district and being persons paying assessments in said district, requesting that certain improvements be made in the outlet of said district outside of the boundaries thereof, a copy of which said petition of said landowners being attached to said petition for levy of an assessment filed by said commissioners; said petition being in due form and made in pursuance of the statute in such case made and provided.

And it appearing to the court, that due notice of the filing of said petition and of a hearing thereon at the first day of the present term of this court, has been given to all persons interested by posting notices thereof in pursuance of the statute in such case made and provided, at the door of the court house in, county, Illinois, and at the door of the court house in, county, Illinois (said district lying within the boundaries of each of said counties), by posting a copy of such notice in at least ten of the most public places in said district, all of said notices having been posted more than two weeks prior to the first day of the present term of this court, and further, by causing a copy of such notice to be published for the space of two successive weeks in the, a newspaper of general circulation, printed and published every week day in the city of, in said county, and also by mailing to each party interested a true copy of such notice more than two weeks prior to the first day of the present term of this court, the giving and serving of all of above notices on all persons interested in said district, being fully proven and established by certificates of such posting and publication filed in the office of the clerk of this court, the court finds that it has jurisdiction at this term of court to determine all matters and things in said petition contained.

And thereupon, this cause coming on for further hearing upon said petition, and the answers or objections filed thereto, and the court having heard the testimony of witnesses duly sworn and examined in open court, and it further appearing to the court that the funds heretofore raised for the purpose of constructing and maintaining said drainage district are not sufficient for the purpose of the repairs and improvements proposed in said petition; that an itemized account and general statement thereof, duly certified according to law, is on record in this court; that it is necessary that the main ditch of said drainage system and the outlet of said main ditch through and crossing the lands of the estate of, and the lands of be repaired, cleaned out and improved; that said repairs and improvements will greatly benefit the lands comprised in said district; that the cost of such repairs and improvements should be charged against and spread over the lands of said district on the basis of the classification, of assessments heretofore made in said district; that the cost of such repairs and improvements, incidental expenses, and the cost of the proceedings necessary therefor, will be about dollars; that none of the lands comprised in said district will be damaged by such proposed work; that said commissioners have on hand for such purpose the sum of dollars, which, in addition to the assessment prayed for, will be sufficient to make the proposed repairs and improvements;

that the aggregate amount of the benefits of such repairs and improvement will greatly exceed the cost of the construction thereof including incidental expenses and the cost of this proceeding; and that the survey and profile of such drainage system is now on file in this court and is sufficient for the purpose of such improvement:

It is therefore ordered, adjudged and decreed by this court, that the commissioners of said district spread an assessment on the lands of said district, on the same basis and in accordance with the classification of lands heretofore made in said district, and in the sum of dollars; and that they forthwith proceed to make said repairs and improvements as prayed for in their said petition.

3282 Assessment roll

Assessment roll or tax list of special assessment levied on the lands in drainage district number of the towns of and, in the county of and state of Illinois, by the commissioners of said drainage district pursuant to the order of the court in that behalf as filed, 19..

| Number | Owner's name | Description of lands | | | | No. A. | Total tax | Instalment due 19 | Instalment due 19 |
|--------|--------------|----------------------|-----|----|----|--------|-----------|-------------------|-------------------|
| | | Sub. Div. | Sc. | T. | R. | | | | |
| | | | | | | | | | |
| | | | | | | | | | |

OBJECTIONS

3283 Affidavit of nonresidence

An affidavit of nonresidence in a proceeding by the commissioners for an additional assessment is unnecessary where the sworn petition of the commissioners contains the statement of the residences of the nonresident landowners.¹⁴²

3284 Damages

The question of damages cannot be raised in a supplemental or additional assessment for drainage purposes.¹⁴³

¹⁴² Stack v. People, 217 Ill. 229.

¹⁴³ Fountain Head Drainage District v. Wright, 228 Ill. 212.

3285 Itemized statement of account

The itemized statement of accounts which is to be filed with the petition is not jurisdictional, and objections to the sufficiency of the statement must be first urged in the trial court.¹⁴⁴

3286 Notice, waiver

Resident landowners cannot object for nonresident landowners on the ground of want of proper notice to them in a proceeding under the Levee act.¹⁴⁵

Appearing before the jury on the hearing upon the question of the assessment of damages waives any defect in the notice to appear.¹⁴⁶

3287 Omitted property, amendment

Landowners who are not affected by an amendment of an assessment roll and the addition thereto of omitted property cannot object for those whose property has been included in the roll by the amendment.¹⁴⁷

3288 Res judicata

The defeat of one proceeding for an additional drainage assessment is no obstacle to another similar proceeding.¹⁴⁸

3289 Statute, validity

The provisions of the Levee act which authorize the levy of an additional assessment to pay for work that has become necessary to complete a drainage system or to keep it in repair, are sufficiently included under the general title of the original act, and as a part of it, provide for ample notice to the landowners of the district.¹⁴⁹

PRACTICE

3290 Order continuing objections

(Caption)

And now on this day of, 19.., at the hour of o'clock M., appear the commissioners of

¹⁴⁴ *Sny Island Drainage District v. Shaw*, 252 Ill. 151; Sec. 37, Levee act (Ill.).

¹⁴⁵ *Sny Island Drainage District v. Shaw*, 252 Ill. 157; Secs. 60, 61, Levee act (Ill.).

¹⁴⁶ *Sny Island Drainage District v. Shaw*, *supra*.

¹⁴⁷ *Sny Island Drainage District v. Shaw*, *supra*.

¹⁴⁸ *Vandalia Drainage District v. Hutchins*, 252 Ill. 261.

¹⁴⁹ *Sny Island Drainage District v. Shaw*, 252 Ill. 153; Sec. 37, Levee act.

drainage district, number, of the townships of and county of, state of Illinois, and present here to said justice the special assessment of the lands in said drainage district which they were authorized to levy by an order of said justice of date of the day of, 19.., for the purpose of hearing any and all objections that might be made to their assessment of damages and benefits to the lands in said district and to their special assessment of the land in said district; and it appearing to said justice that due and proper notice was given to all of the landowners in said district of the time and place and purpose of this hearing for the length of time and in the manner required by law, and the landowners of said district having appeared at the time and place last mentioned; and it appearing that no objections were made to the assessment of damages and benefits and to the assessment levied by said commissioners against the several tracts of land in said district except those hereinafter mentioned; and it further appearing that, the owner of the (Describe land), and, the owner of the (Describe property), all in said town of, and, the owner of the (Describe land), all in said town of, appeared before said court and said drainage commissioners and made objections to the assessments of damages and benefits and to the amount of taxes assessed against the tracts of land set opposite their respective names, upon the ground that each of said tracts of land were assessed too high; and said commissioners having heard all of said objections and all evidence offered before them and being unable at this time to pass upon all of said objections with proper consideration, and the said commissioners being desirous of having further time for such consideration, it is ordered by said justice that said commissioners have until the day of, 19.., at the hour of . . . o'clock . . . M., in which to consider said objections and report to this court an assessment roll showing the total amount assessed against each tract of land in said district after making such changes in the several tracts of land to which objections were filed that they think just and right; to which last named time this cause is continued.

.....
Justice of the Peace.

ABANDONMENT

3291 None in additional assessment

No abandonment is authorized of proceedings for an assessment to pay for additional work to drain lands in a district which is insufficiently drained by the original system, or for additional

work, or to complete work in accordance with the original plans that were adopted for the drainage at the time of the organization of the district. The statute which authorizes the abandonment of assessment proceedings is limited to the orders and proceedings which are made and take place before the contract is let for the construction of the original system of the drainage as provided for at the time of the organization of the district.¹⁵⁰

EVIDENCE

3292 Assessment roll

An assessment roll which contains an estimate of damages is admissible in evidence, provided that the jury are instructed to disregard the roll in making up their finding on the question of damages and that they be governed solely by the evidence submitted to them.¹⁵¹

3293 Prima facie case

The assessment roll with the commissioners' testimony as to the basis upon which the assessment was made are admissible in evidence to make out a *prima facie* case on behalf of the municipality; and the mere introduction of evidence on the part of the objector will not affect the *prima facie* case thus made, unless the evidence in rebuttal is sufficiently strong to overcome it.¹⁵²

JUDGMENT

3294 Confirming assessment

(Caption)

And now on the day of, 19..., the drainage commissioners of drainage district number of the towns of and county of, and state of Illinois, having appeared before said justice and filed their assessment of taxes against the several tracts of land situated in said drainage district, containing such corrections as in the judgment of said commissioners was just and right, and said justice having carefully examined said assessment roll and tax list, does hereby order

¹⁵⁰ *Sny Island Drainage District v. Shaw*, 252 Ill. 152; Sec. 44, Levee act (Ill.).

¹⁵¹ *Sny Island Drainage District v. Shaw*, 252 Ill. 159.

¹⁵² *Sny Island Drainage District v. Shaw*, 252 Ill. 158.

that the same be and is hereby confirmed; and he further orders that the amount of said tax be divided into two equal instalments, the first of which instalments shall become due and payable, 19.., and the second instalment shall become due and payable, 19..

And the said assessment roll being now presented to said justice and he having carefully examined the same, including the amount of the several instalments above mentioned, does now in all things confirm the same and orders said assessment roll to be spread upon the records of this district and to be witnessed by the signatures of each of said commissioners and said justice.

Justice of the Peace.

3295 Appeal

No appeal lies from a judgment of a justice of the peace in cases brought before him under the Farm Drainage act.¹⁵³

DISSOLUTION

3296 Assessment

The classification of lands constitutes a special assessment, and all of the lands classified above zero as to which no appeal has been taken are "assessed" land; all of the lands which are placed in the zero class are not "assessed" lands. No other assessment is necessary to authorize the filing of a petition to dissolve a drainage district.¹⁵⁴

3297 Indebtedness, payment

A drainage district may be dissolved in Illinois when there is no indebtedness against the district.¹⁵⁵

The payment to the drainage clerk, and his payment to the creditors, before final order of dissolution is made, of all of the indebtedness of the drainage district is a substantial compliance with the statute which authorizes the dissolution of a drainage district.¹⁵⁶

¹⁵³ Drainage Commissioners v. Harms, 238 Ill. 414 (1909).

¹⁵⁴ Cosby v. Barnes, 251 Ill. 460, 463 (1911); Secs. 21, 22, 59, Farm Drainage act (Hurd's Stat. 1909, p. 918).

¹⁵⁵ People v. Niebruegge, 244 Ill. 87; Par. 191, Hurd's Stat. 1908, p. 876.

¹⁵⁶ Cosby v. Barnes, 251 Ill. 468; Laws 1889, p. 117 (Hurd's Stat. 1908, p. 918).

PARTIES

3298 What persons and number

A petition for the dissolution of a drainage district must be signed by persons who own not less than three-fourths in area of the assessed land of the district, including that owned by minors.¹⁵⁷

None but *bona fide* adult landowners may sign a petition for the dissolution of a drainage district. It may be signed by an attorney or agent. Highway commissioners in their corporate capacity are considered landowners and competent signers. Each board constitutes one owner, if signed by two or more of that board.¹⁵⁸

PETITION

3299 Power of attorney

Know all men by these presents, that I, the undersigned, of the county of, state of, having made, constituted and appointed, and by these presents do make, constitute and appoint, of the county of, state of Illinois, my true and lawful attorney for me, and in my name, place and stead, to act for me and sign all petitions and papers opposing the organization of the drainage district and to perform all duties in relation thereto that I could personally do were I present and acting in my own behalf, and particularly to sign my name as the landowner to certain petitions now being circulated by and among the objectors looking towards a dismissal of the proceedings now pending in the organization thereof, and to use his discretion therein to carry out my herein expressed wish to oppose the same by all legal means and processes, giving and granting unto, said attorney, full power and authority to do and perform all and every act and thing whatsoever, requisite and necessary to be done in and about the premises as fully, to all intents and purposes as I might or could do if personally present, with full power of substitution or revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue thereof.

¹⁵⁷ Beatty v. Zimmerman, 249 Ill. 180, 181 (1911); Sec. 1, Laws 1889, p. 117.

¹⁵⁸ Cosby v. Barnes, 251 Ill. 465, 467.

In witness whereof I have hereunto set my hand and seal
the day of, 19..

.....(Seal)

Sealed and delivered in the presence of:

.....
.....

(Venue)

On the day of, 19.., before me, a
of the county of in the state of, ap-
peared, personally known to me to be the
real person whose name is subscribed to the foregoing power of
attorney, as having executed the same, and then acknowledged
the execution thereof as his free act and deed.

Given, etc.

3300 Petition

State of Illinois, }
..... county. } ss.

In the county court of county,
Probate term, 19..

In the matter of the

..... Drainage District.

To the honorable, judge of the said county court:

We, the undersigned petitioners, being owners of land and
constituting in number two-thirds of all the landowners of
said district, and the combined owners of more than half in
area of the lands assessed for benefits in said district whose ag-
gregate assessment amount to half the cost of the proposed
works, including all debts and expenses incurred up to the
time of the filing of this petition, hereby petition that the whole
system of the proposed works constituting the said
district may be abandoned and the district abolished, and that
the court may enter an order granting the prayer of this peti-
tion in accordance with the provisions of the statute in such a
case made and provided.

Dated, etc.

(Signatures)

Petition to Dissolve

Filed
Clerk of the county court
of county.

..... presented this
date and set for hearing
..... at
..... Judge.

3301 Withdrawing names, application

(Caption)

Comes now and represents to the court that he is the owner of the (Describe property) situated in the county of and state of Illinois, and located in and forming a part of drainage district. That he signed his name to the petition of and others, to abandon and abolish said drainage district, which said petition was presented to and filed in said court on and set for hearing on atM. That he further represents that he now desires the proposed improvement to be made and said drainage district to continue to exist, and wishes to withdraw, and does hereby withdraw, his name as petitioner from said petition, and hereby authorizes and requests this honorable court to strike his name from said petition and to dismiss said action as to him and his said lands.

Dated, etc.

.....
Petitioner.

b

(Caption)

Comes now and shows to the court that she is the owner of the (Describe property) situated in the county of and state of Illinois, consisting of acres, which said real estate is included in and forms a part of the said drainage district; that the petition of and others to abandon and abolish said drainage district presented to and filed in this court on the and set for hearing on at was signed for her prior to the jury's verdict of assessment of benefits and damages in said cause; that said verdict of the jury as to her lands is entirely satisfactory to her and she is now in favor of the construction of the improvement in the said drainage district, and is opposed to the abandonment and abolishment of said drainage district; that she desires therefore to withdraw, and does hereby withdraw, her name as a petitioner from said petition to abandon said district, and hereby authorizes and requests this honorable court to strike her name from said petition and to dismiss that petition as to her said lands.

Dated, etc.

.....
Petitioner.

Order

(Caption)

And now at this day again come the parties herein, by their attorneys; and the petitions to withdraw names from petition

to dismiss coming on to be heard, they are argued by counsel; and the court having heard said petitions and being fully advised in the premises, doth allow the petition of, to which order the court in allowing said petition each other petitioner except, excepts; and as to the petition of to withdraw the name, the court doth allow the same, to which order of the court each other petitioner except, excepts. And it is ordered by the court that the names of and be stricken from the petition to dissolve said district, and that the petition to dissolve said district is hereby ordered dismissed as to them and their lands respectively; to which order of the court each and every petitioner except and, excepts.¹⁵⁹

OBJECTIONS

3302 Form

(Caption)

Come now the commissioners of said district and show to the court that said petition should be denied for the following reasons:

1. The persons signing said petition are not owners of land within the said district.

2. The petitioners do not constitute two-thirds in number of all the landowners in said district.

3. Said petitioners are not the combined owners of more than half in area of the lands assessed for benefits in said district.

4. The aggregate assessments levied against the lands of said petitioners do not amount to half of the cost of the proposed work, and all debts and expenses incurred up to the time of the filing of said petition.

5. Said petition was not executed by the persons whose names are therein subscribed.

6. No petition was filed for dissolution of the on the

7. Names cannot be added to a petition to abandon a drainage district after the petition has been filed.

.....
Attorneys for

TRAVERSE OR ANSWER

3303 Jurisdiction, waiver

Answering or traversing the allegations of a petition for the dissolution of a drainage district after objections to the petition have been overruled, waives jurisdictional objections.¹⁶⁰

¹⁵⁹ Boston v. Kickapoo Drainage District, 244 Ill. 577.

¹⁶⁰ Cosby v. Barnes, 251 Ill. 464.

HEARING, EVIDENCE, ORDERS AND APPEAL

3304 Hearing, order for

(Caption)

And now at this date, and others, filed herein their petition to dissolve said district. It is ordered by the court that hearing on said petition be set for, at o'clock It is further ordered by the court that notice be mailed to petitioners within two days of this date.

3305 Evidence, prima facie

Upon a petition for the dissolution of a drainage district, a *prima facie* case showing title in the petitioners is made out by introducing in evidence the classification roll and the other files of the organization of the district.¹⁶¹

3306 Order denying dissolution

(Caption)

This cause coming on to be heard upon the petition of and others to abandon and abolish said drainage district, filed in said court on, and set for hearing on, at, and upon the objections of the commissioners of said drainage district filed in said proceeding; and the court having heard the testimony of witnesses and the arguments of counsel; and being fully advised in the premises, doth find that the said petitioners are not entitled to the relief in said petition prayed: the court doth therefore order and adjudge, and it is hereby ordered and adjudged, that the prayer of said petition be and the same is hereby denied.

3307 Order abolishing, requisites

A drainage district is not abolished until the entry of an order to that effect.¹⁶² It is not necessary, in an order abolishing a drainage district, to fix and determine the cost, debts and expenses of the district, if no evidence is introduced upon these items.¹⁶³

3308 Appeal, jurisdiction

Each petitioner has a right to a separate or joint appeal from an order dismissing a petition to dissolve a drainage district.¹⁶⁴

¹⁶¹ Cosby v. Barnes, *supra*.¹⁶² Boston v. Kickapoo Drainage District, 244 Ill. 579¹⁶³ Boston v. Kickapoo Drainage District, 244 Ill. 580.¹⁶⁴ Cosby v. Barnes, 251 Ill. 462;

An appeal from an order of the county court dismissing a petition to dissolve a drainage district must be taken directly to the supreme, and not to the circuit court.¹⁶⁵

TAXATION

3309 Annual assessment, amount

A drainage district may include in its annual levy for the maintenance of the district, and amount that will be necessary to pay a tax on property which is not exempt from taxation.¹⁶⁶

3310 Extending payment, order

In the matter of special drainage district in and counties and state of Illinois.

Whereas, we, the undersigned commissioners of said special drainage district in and counties and state of Illinois, did on the day of, 19.., make our resolution and certificate of taxes levied in the sum of dollars and cents against the lands, properties and townships in said drainage district, and did file the same in the office of the clerk of the county court of said county on the day of, 19..; and

Whereas, in and by our said order, bearing date the day of, 19.., we directed the said clerk to compute and apportion the amount thus levied on the several tracts, properties and townships of said district according to law; and,

Whereas, the clerk pursuant to said order and direction did so compute, apportion and certify thereto on the day of, 19..; and,

Whereas, we, the undersigned as such commissioners, by our order bearing date the day of, 19.., approved and confirmed said apportionment and computation; and,

Whereas, by our certain other order entered on said day of, 19.., we postponed and extended the time of payment of said tax and assessment until the day of, 19.., at o'clock in thenoon of said day; and,

Whereas, now, at the hour of o'clock in the noon on the day of, 19.., it appears that there has been paid on said levy and assessment the sum of

Sec. 97, Practice act (Hurd's Stat. 1909, p. 1708); Par. 82f, c. 37, Hurd's Stat. 1909, p. 683.

¹⁶⁵ Kline v. Barnes, 250 Ill. 404, 406 (1911); Sec. 3, Laws 1909, p. 171.

¹⁶⁶ Nutwood Drainage District v. Board of Review, 255 Ill. 447, 449 (1912).

..... dollars and cents, leaving unpaid of the taxes and assessments so levied the sum of dollars and cents; and,

Whereas, it is the judgment of said commissioners that the present payment of said unpaid portion of said levy for the accomplishment of the purposes for which the same was made, would impose too heavy a burden upon the landowners and persons in said district unless the time of payment thereof be deferred, and that the interests of the district and the convenience of the tax-payers thereof will be best subserved by dividing said unpaid portion of said levy into instalments and by deferring the payment thereof in the manner hereinafter provided, and that the immediate requirements of the districts be provided for by the issuance of notes secured by the second and the third instalments of said levy so to be deferred:

Now, therefore, it is hereby ordered that the said unpaid portion of said taxes levied amounting to dollars and cents be, and the same is hereby divided into equal instalments of dollars and cents each, and that the time of payment of one of said instalments be, and the same is hereby, postponed and the time of payment thereof is hereby fixed to be made on the day of, 19..; that the time of payment of the second of said instalments be, and the same is hereby, postponed and the time of payment thereof is hereby fixed to be made on the day of, 19..; that the time of payment of the third and last instalment is hereby postponed and the time of payment thereof is hereby fixed to be made on the day of, 19..; and,

It is hereby further ordered that there be issued notes of said drainage district of which shall be for the sum of dollars each, and of said notes for the sum of dollars and cents each, all bearing even date herewith, payable to bearer with interest thereon at the rate of per cent per annum from the date thereof, payable annually at the office of the county treasurer of said county in the of and state of Illinois, and that one of said notes for dollars and cents, and of said notes for dollars each shall be made to mature on day of, 19.., and that the remaining of said notes shall be made to mature on the day of, 19..; that notes amounting to the sum of dollars and cents and maturing on be issued against the second instalment of said levy; that the remaining of said notes amounting to the sum of dollars and cents and maturing be issued against the third instalment of such levy; and,

It is hereby further ordered that the commissioners negoti-

ate said notes at the best market price obtainable therefor, but in no event at less than par.

Dated at, Illinois, this day of, 19..

.....

Commissioners of said
 special drainage district.

3311 Certificate of levy

In the matter of special drainage district in and counties and state of Illinois.

State of Illinois, }
 county. } ss.

To, county clerk of said county.

We, the undersigned, and, the commissioners of said special drainage district in and counties and state of Illinois, do hereby certify:

1, That on the day of, 19.., there were issued by the commissioners of said drainage district bonds of said drainage district amounting to the total sum of dollars and that all of said bonds still remain unpaid, but that on, to wit, the day of, 19.., each and all of said bonds were duly registered with the auditor of public accounts in and for the said state of Illinois, who, as required by law, makes and files the necessary certificates for the amounts required to meet the payments of interest and principal of said bonds as they severally become due, and that no levy is therefore required to be made by these commissioners to meet the payments of the principal or interest on said bond.

2, That on the day of, 19.., there were issued by the commissioners of said drainage district notes of said district of that date amounting to the total sum of dollars and cents, of which notes bearing numbers to, and to, both inclusive, are for the sum of dollars each, and notes bearing numbers and, are for the sum of dollars and cents each; that said notes bear interest at the rate of per cent per annum from the date thereof payable annually at the office of the county treasurer of said county; that notes bearing numbers to, both inclusive, will mature on the day of, 19.., and notes bearing numbers and both inclusive, will mature on the day of, 19..; that all of said notes are now outstanding and unpaid.

That the amount necessary to be levied against the lands of the district assessed for benefits in the construction of the

system of drainage of said district and whose tax under the levy of the day of, 19.., (said notes having been issued against the unpaid second and third instalments of said levy) have not been paid, in order to meet the payments of interest on said notes and which payments matured during the ensuing fiscal year, viz., on and on, is the total sum of dollars and cents, of which amount the sum of dollars and cents is required to pay the interest which will mature on said notes on, and the sum of dollars and cents is required to pay the interest which will mature on

3, That it is necessary to levy a sum of dollars to keep the work previously done in repair for the year next ensuing.

4, That there is no deficiency in the payment of interest heretofore accrued or in the payment of repairs heretofore made.

5, That there is required to be raised as and for interest at the rate of per cent per annum for one year from and after upon the sum of dollars, being the unpaid part of our tax levy of for which bonds of said district have not been issued; said interest being computed, is ascertained to be the sum of dollars and cents.

6, That there is required to be raised as and for interest at the rate of per cent per annum for one year and months after on the sum of dollars and cents, and for one year after, on the sum of dollars and cents, said sums being the unpaid parts of the second and third instalments of said levy of against which notes or bonds of the district have not been issued; said interest being computed, is ascertained to be the sum of dollars and cents.

Now, therefore, we the undersigned commissioners, as aforesaid, do hereby levy the sum of dollars and cents against the lands, townships and properties of said drainage district on which the assessment heretofore levied on remains unpaid for the following purposes.

The sum of dollars and cents with which to pay the interest maturing on and on on the notes of the district issued as aforesaid; and the further sum of dollars and cents for interest on that portion of the second and third instalments of said levy of against which notes and bonds have not been issued as aforesaid; and we do hereby levy the further sum of dollars against all of the lands within the boundaries of said drainage district for the following purposes, namely:

For the purpose of keeping the work previously done in re-

pair for the year next ensuing; and we do hereby levy the further sum of dollars and cents against the lands, townships and properties of said drainage district, on which the assessment heretofore levied on for the construction of a system of drainage in said district has not been and remains unpaid for the following purposes: dollars and cents for interest on the unpaid part of said levy of for which the bonds of said district have not been issued as aforesaid; and

You are, therefore, hereby authorized and directed to compute, apportion and extend said amount of dollars and cents against the lands, properties and townships of said drainage district upon which said levy of remains unpaid, according to the pro rata share which each of said tracts, townships and properties of said district is required to bear according to benefits as determined in the classification thereof as heretofore fixed and established; and

You are, therefore, hereby further authorized and directed to compute, apportion and extend the additional sum of dollars and cents against all of the lands of said district according to the pro rata share which each of the tracts, townships and properties within said district is required to bear according to benefits as determined in said classification thereof heretofore fixed and established; and

You are, therefore, hereby further authorized and directed to compute, apportion and extend said amount of dollars and cents against the said lands, townships and properties of said drainage district upon which said levy of remains unpaid according to the pro rata share which each of said tracts, townships and properties of said district is required to bear according to the benefits as determined in the classification thereof as heretofore fixed and established; and

You are hereby further directed to proceed to cause said total amount of dollars and cents to be collected according to law.

Done at a meeting held on the northeast quarter (N. E. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section in township, county, Illinois, and within the boundaries of said drainage district, this day of, 19..

.....,

 Commissioners of special
 drainage district in
 and counties, Illinois.

3312 Registered bonds, auditor's certificate

Auditor's Office

State of Illinois.

Springfield,

To the county clerk of county, Illinois:

In pursuance of law, I,, auditor of public accounts of the state of Illinois, do hereby certify that, as estimated and determined by me, the amount needed to pay interest on bonds issued by the drainage commissioners of special drainage district of and counties and registered in this office, together with the ordinary costs of collecting and disbursing the same, as estimated by the auditor and treasurer, is dollars.

I hereby certify the amount to you as county clerk, and notify you to apportion the same against the several tracts and property assessed for benefits in said drainage district for the year

In testimony whereof I hereto subscribe my name and affix the seal of my office, the day and year first above written.

.....
Auditor of public accounts.

3313 Notice or demand

County Treasurer's Office

....., Ill.,

You are hereby notified that the special assessments of dollars with interest at the rate of per cent per annum from against the following property, viz., in special drainage district in and counties and state of Illinois, is due; and if it is not paid before, the tracts will be advertised and sold with others delinquent for taxes.

Respectfully,

.....
County Collector.

3314 Proof of service

State of Illinois, }
..... county. } ss.

I,, do certify that I am the county collector in and for the county of and state of Illinois; that on the day of, 19.., I sent by mail by depositing in the post-office in, of in said county, with first class letter postage fully prepaid thereon, a notice of an unpaid special assessment of the special drainage district in and counties in the state of Illinois, addressed to

at, Illinois, notifying her that the special drainage assessment levied on the day of, 19.., by the commissioners of said drainage district amounting to dollars against the (Describe property) was still unpaid, and that unless the assessment therein mentioned was paid, I would advertise and sell the real estate therein mentioned for delinquent taxes; a copy of which notice is hereto attached and made a part hereof.

Witness, etc.

(County Collector)

3315 Special warrant

Special assessment, special drainage district in the counties of and, state of Illinois.

State of Illinois, }
 county. } ss.

The people of the state of Illinois, to, treasurer and collector of said drainage district, greeting:

You and your successors in office are commanded to collect the sums of money set forth in the several instalments of the foregoing special assessments, each instalment to be collected in the year said instalment becomes due, as shown on said roll according to law.

Witness, etc.

(County Clerk)

CHAPTER LVII

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PRIMARIES

3316 City office, petition, filing

Candidates for city offices and offices of other municipalities less than a county but which are wholly within one county, are required to file but one petition, and that with the clerk of the particular municipality in which the election is to be held.¹

3317 County office, petition, filing

Candidates for county offices are required to file but one petition with the county clerk to entitle them to a place on a primary ballot, and they are not required to file another petition with the board of election commissioners in municipalities having such boards, but it is the implied duty of these boards to call upon the county clerk for a list of county candidates with a view of placing their names on the proper ballots.²

3318 State office, petition, filing

Candidates for state offices, and for other offices to be elected in and for territory that is partly in two or more counties, should file their petitions with the secretary of state; no other petition being necessary.³

NOMINATIONS

3319 Validity

The decision of the county judges of an election district upon a question of nomination is final under the Illinois statute.⁴

¹ *People v. Czarnecki*, 254 Ill. 72, 76 (1912).

² *People v. Czarnecki*, 254 Ill. 75, 77; Sec. 61, Primary law 1910.

³ *People v. Czarnecki*, 254 Ill. 75, 76.

⁴ *People v. Rose*, 211 Ill. 259, 262 (1904).

3320 Void and valid, choice

The nominee of a convention cannot be required to make his election between a void and valid nomination.⁵

3321 Objections, requisites

In an election contest, an objection to the certificate of nomination of an opponent cannot be made if such an objection was not made in the manner provided by statute.⁶

3322 Objections, form (Ill.)

....., Secretary of State,
Springfield, Illinois.

Dear Sir:

On the day of, 19..., you wrote to, of, Illinois, a letter, which, without the date, address and postscript, is as follows:

"On, there was filed in this office a certificate of nomination certifying to the nomination of and, as the candidates of the democratic party of the senatorial district for the office of representative in the general assembly. On, another certificate was filed certifying to the nomination of, as the sole candidate of the said party for the said office, and certifying further to a resolution of the convention that the official ballot shall indicate that said candidate shall receive '..... votes.' Both of said certificates are in apparent conformity to law. In the absence of the filing of objections, this department has no means of determining which of these certificates expresses the legal act of said party for said district. Unless written objections shall be filed as the law provides (paragraph 297, chapter 46, Hurd's Stat. 1911,) it will be my duty to certify to the several county clerks of the counties comprising the said senatorial district as the candidates of said party for said office the following names, to wit:,"

And now the undersigned and, as attorneys for the nominees of the convention held at the court house in, on, 19..., of which the certificate of nomination was filed with you on, 19..., and, secretary of said convention, and, chairman of said convention, and, nominee of said convention for repre-

⁵ *People v. Rose, supra.*

⁶ *Welsh v. Shumway*, 232 Ill. 54, 59 (1908).

sentative from the said senatorial district, and , nominee of said convention for senator from said district, hereby as such attorneys and officers and as qualified delegates to said convention and participants therein hereby make and ask you to file the following objections to the pretended purported certificate of nomination mentioned by you as having been filed with you on , 19.., in which it is claimed and , were nominated for the office of representative in the general assembly for senatorial district:

1, was not nominated at the democratic convention held at , on , 19.., for any office.

2, There was no such democratic convention held on , 19.., or at any other time in 19.., in which or was nominated for any office.

3, There was no such convention held by a majority of the accredited delegates from the respective counties comprising the senatorial district at , Illinois, , 19.., as claimed by said certificate of nomination so filed with you on , 19..

4, The pretended nomination of , or of , for said office was not made at any place nor by any democratic delegates authorized by law, nor by the usages, laws and customs of the democratic party.

5, That senatorial district of Illinois is and was on the day of , 19.., composed of the following counties: (Name them). That under the usages, laws and customs of the democratic party and apportionment and allotment of the number of delegates to which each of said counties was entitled in the convention in 19.., for the nomination of candidates for offices of representative and senator for said district was as follows: county, delegates; (Enumerate other counties and give number of delegates for each). That under the laws, usages and customs of said democratic party a convention was legally and regularly called by the senatorial committee consisting of one committee-man from each of said counties to meet at , Illinois, , 19.., at the hour of o'clock and minutes, in the afternoon, for the nomination of candidates for representative and senator for said district for said democratic party. That at the said time and place full delegations from the said counties of (Name them), aggregating in all, in which there were no contested delegations, met at said time and place; and together with a portion of the delegates for the counties of and

....., and one, and one, as alleged delegates from county, and said, claiming to hold the proxy of the chairman of the senatorial committee, undertook to make the said permanent chairman of said convention, and that said, as temporary chairman of said convention, refused to recognize any of the delegates from said counties of, or to permit any of them to make nominations for permanent chairman, or to appeal from the decision of the chair, or to grant a roll call of counties on the question of the permanent organization of the convention. That at said time and place, said, acting with and under the direction of said, declared as illegal the election of said, as permanent chairman of said convention, and called for nominations for state senator; at which time, then and there, the full delegations from said counties of and, aggregating a total of delegates, elected, of, Illinois, as permanent chairman of said convention, and, of, Illinois, permanent secretary of said convention, and legally proceeded to the nomination of, of, Illinois, for the office of said state senator, and, of, Illinois, for the only candidate on the democratic ticket for representative; that no other nominations were made by said last mentioned delegates, or any other pretended delegates, at that time and place; and that said nominations are those indicated in the certificates of nomination filed with you on the day of, 19.., and are not those filed with you as indicated in the certificate of nomination filed with you on the day of, 19..

6, That the nominations pretended to have been made as indicated in the said pretended certificate of nomination filed with you on, 19.., were made by said and said, and probably some others associated with them whose names are to us unknown, at some other place than that where said convention was called and organized, and were made without any authority, and are illegal and void, and were made by said and, and whoever were associated with them, after they had participated in the temporary organization of the regular convention, and after they had bolted from and gone out of the convention where called, organized and concluded; and that said convention, if ever held as mentioned by said certificate of nomination filed with you on, was not participated in by any of the legal delegates from said counties of,

and was held without any authority from the democratic party or its delegates.

.....

 Attorneys and delegates to convention that nominated
 for state senator and
 for representative as shown by certificate filed, 19..

.....
 Chairman of convention.

.....
 Secretary of convention.

.....
 Nominee for representative.

.....
 Nominee for state senator

3323 Order

We, the undersigned county judges of their respective counties comprising the senatorial district, in the matter of the objections to the certificate of nomination of and, for representatives in the general assembly, and in the matter of the objections to the certificate of nomination of, for state senator, and, for representative, in the general assembly, sitting as an election board, do hereby find as follows:

1, That the convention presided over by, as chairman, with, as secretary, is the regularly called and held democratic convention for the senatorial district held, 19., at, Illinois, and that, of, county, Illinois, and, of, county, Illinois, are the regular nominees of said convention for representatives in the general assembly from the senatorial district, and that their names are entitled to go on the official ballot at the ensuing election, to be held on, 19., for representatives in the general assembly from senatorial district as the nominees of the democratic party; and the objections to the certificate of nomination of said and, are hereby overruled and the said certificates of nomination are held to be legal and valid.

2, That we sustain the objection to the certificate of nomination of, for state senator, and, for representative in the general assembly from the senatorial district, and hold the said certificate of nomination

last above mentioned to be illegal and void; and that the names of said, for state senator, and of, for representative of the general assembly, as certified in said certificate of nomination, are not entitled to go upon the official ballot at the ensuing election.

The proceedings upon the foregoing objections were held at the court house in the city of, in county, Illinois, on the and days of, 19.., pursuant to due notice thereof as provided by law in such cases, and all parties to said proceedings were present in person or by attorney.

Dated at, Illinois, this day of, 19..

.
Chairman, county judge of
. county.

.
Secretary, county judge of
. county.

.
County judge of
county.

ELECTION CONTEST

3324 Election districts and precincts, boundaries

In city elections the city council, and not the county board, has power not only to appoint the judges and clerks, and to name the polling places, but also to establish election precincts or districts and fix their boundaries; the act which is applicable to city elections is the general act incorporating cities and villages, and not the general election law.⁷

An election district must be formed at least thirty days before an election.⁸

3325 Fraud

Fraud in the conduct of an election in a district will not vitiate the entire vote cast, if the honest votes can be separated from the dishonest.⁹

3326 Misconduct and irregularities

In the absence of statute misconduct and irregularities of election officers in conducting an election will not vitiate the

⁷ Welsh v. Shumway, 232 Ill. 61,
68.

⁹ Brents v. Smith, 250 Ill. 521,
535 (1911).

⁸ Welsh v. Shumway, 232 Ill. 74.

election nor invalidate the votes of innocent electors, unless it appears that the result was thereby affected.¹⁰ An election is void if it was conducted in a matter of substance in total disregard of a clear and positive enactment of the statute.¹¹

3327 Proclamation of judges

The failure of judges to make a proclamation according to statute cannot be urged in an election contest.¹²

3328 Voters, county charge

By merely becoming an inmate of an almshouse, a person does not lose his right to vote.¹³

3329 Voters, old age

A person is not disqualified from voting on account of old age unless his mental powers, at the time of voting, are so impaired that he would not be qualified to make a will.¹⁴

3330 Voters, residence

The legal residence of a person for the purpose of voting is where he actually resides with no present intention of leaving it; although he might leave it as interest or whim might direct.¹⁵

3331 Voters, students

A student is qualified to vote if he is of age, if he supports himself entirely by his own efforts, if he is not subject to parental control, and if he regards the place where the college is situated as his home and has no positive and fixed intention as to where he will locate when he leaves, although he might at some future time intend to remove.¹⁶

3332 Voting machines

Voting by voting machine is lawful when made so by statute.¹⁷

¹⁰ Choisser v. York, 211 Ill. 56, 64 (1904).

¹¹ Harvey v. Cook County, 221 Ill. 76, 83 (1906).

¹² Choisser v. York, *supra*.

¹³ Welsh v. Shumway, 232 Ill. 83.

¹⁴ Welsh v. Shumway, 232 Ill. 75.

¹⁵ Welsh v. Shumway, 232 Ill. 78.

¹⁶ Welsh v. Shumway, 232 Ill. 88.

¹⁷ Henderson v. Election Commissioners, 160 Mich. 36, 41 (1910).

JURISDICTION

3333 Law and equity

An election contest may be brought in a court of equity or in a court of law, provided the particular court has jurisdiction under the statute to try election contests; and the proceeding is transferable from one docket of a court having a common law and equity jurisdiction to another docket.¹⁸

3334 Circuit and county courts

In primary election contests for state, congressional and senatorial offices and for the office of county judge the circuit court has exclusive jurisdiction; in all other contests, the county court has jurisdiction.¹⁹

The county court has jurisdiction in an election contest to determine the election of park trustees, notwithstanding section 12 of the Park act.²⁰

The county court has no jurisdiction of an election contest involving a special tax for the building of gravel roads.²¹

3335 Superior court

The superior court of Cook county has jurisdiction in contested elections.²²

3336 Jurisdiction, scope

The eligibility of the persons elected cannot be determined in an election contest, but is determinable upon an information in the nature of *quo warranto*.²³ In an election contest, the court has jurisdiction only to determine which of the contestants has been elected.²⁴

¹⁸ *Quartier v. Dowiat*, 219 Ill. 326, 329 (1906).

¹⁹ *People v. Deneen*, 256 Ill. 536, 539 (1912); Sec. 13, Primary act (Hurd's Stat. 1911, p. 1098); *Cataldo v. Ostiuso*, 253 Ill. 138, 139 (1912); Sec. 62, Primary act 1910.

²⁰ *Baker v. Shinkle*, 249 Ill. 154, 158 (1911); Secs. 97, 98, Election law (Hurd's Stat. 1909, p. 971); Sec. 12, Park act 1893 (Ill.).

²¹ *Shirar v. Eldridge Township*, 249 Ill. 617, 618 (1911); Sec. 98, Election law.

²² *Kerr v. Flewelling*, 235 Ill. 326, 329, 330 (1908).

²³ *Edgecomb v. Wylie*, 248 Ill. 602, 603 (1911).

²⁴ *Welsh v. Shumway*, 232 Ill. 59.

PARTIES

3337 Necessary and unnecessary

All the candidates for a particular office must be made parties to the proceeding contesting the election for that office.²⁵ Candidates who would be in no way affected by the election contest are unnecessary parties to it.²⁶ The want of an unnecessary party to an election contest will not affect the jurisdiction of the court, even when better practice requires the omitted person to be made a party.²⁷

3338 Contestee's resignation

A proceeding to contest an election cannot be maintained after the resignation of the person who would have to be made a party to the contest.²⁸

PRACTICE

3339 Proceeding, nature

Notwithstanding the Illinois statutory provision that courts of equity shall have jurisdiction of all cases of contested election and that they shall be tried in like manner as cases in chancery, the proceeding to contest an election is neither an action at law nor is it a suit in equity, but it is purely a statutory proceeding unknown to the common law.²⁹

²⁵ Conway v. Sexton, 243 Ill. 59, 67 (1909).

²⁶ Brents v. Smith, 250 Ill. 526.

²⁷ Arnold v. Keil, 252 Ill. 340, 342 (1911).

²⁸ Holt v. Willett, 252 Ill. 233, 235 (1911).

²⁹ Devous v. Gallatin County, 244 Ill. 40, 43 (1910); Kerr v. Flewelling, 235 Ill. 329; Douglas v. Hutchinson, 183 Ill. 323, 328 (1899); People v. Rose, 211 Ill. 251. In Illinois, the practice in an election contest is confusing. Some of the statutory provisions require chancery forms and other requirements of the statute have in view statutory

or common law forms. Thus, the proceeding is to be commenced by a "statement," but its verification must conform to a verification of a bill in chancery. Likewise, the summons and its service is a mixed form of procedure. It will be noticed from section 8, chapter 22, Chancery act, that the summons itself may be a common law summons, but its service must be made the same as in chancery. The proceeding should be considered, therefore, as neither an action at law nor as a suit in equity, but as a purely statutory remedy. The statute furnishes a substantial code of practice.

STATEMENT OR PETITION

3340 Nature

The nature and character of a statement or petition to contest an election is to be determined from the allegations of the petition, its form and the relief asked therein.³⁰

3341 Requisites, proof

The Illinois statute requires the filing of a written statement setting forth the points of contest. No other form of statement or petition is prescribed. It is only the verification which must be the same as to bills in chancery.³¹ A petition seeking the contest of an election must specifically allege that the petitioner is an elector of the town or county in which the election was held.³²

It is not necessary to specifically name the illegal voters;³³ and the naming by an amendment to the petition of alleged illegal voters does not amount to the introduction of a new cause of action.³⁴

A statement or petition is not limited to the exact proof of the ballots that are alleged to be erroneous; but when the court undertakes to recount the ballots, all of them will be recounted and the result will be declared according to their legal effect.³⁵

3342 Form (Ill.)

(Caption)

To the honorable, the judges of the count of county.

Your petitioner, B, respectfully represents that he is, and was, on the day of, 19..., a citizen of the United States, a citizen of the state of Illinois, and a resident and legally qualified elector and legal voter in the city of, in the county of and state of Illinois, and has been such citizen, resident, and legally qualified elector and voter, in said city, county and state for more than years immediately preceding said day of, 19..., and was then and has been, and is now, and still remains such legally qualified elector and legal voter; that he was then and is now of

³⁰ *Quartier v. Dowiat*, 219 Ill. 328.

³¹ Sec. 113, c. 46, Hurd's Stat. 1903.

³² *Adams v. McCormick*, 216 Ill. 76, 77 (1905).

³³ *Welsh v. Shumway*, 232 Ill. 68.

³⁴ *Widmayer v. Davis*, 231 Ill. 42, 46 (1907).

³⁵ *Hennessy v. Porch*, 247 Ill. 388, 390 (1910).

lawful age, to wit, of the age of years, and was then and there, and now is, in all respects eligible to the office of mayor of the said city of, which said city of is a city in the said county of, in the state of Illinois, duly incorporated and managed as a city under the general incorporation laws of said state of Illinois, to wit, duly incorporated under the general Cities and Villages act, as provided by law.

Your petitioner further shows that on the said day of, 19.., in pursuance of law, an election was held in the said city of, in said county of and state of Illinois, for the election of various city officers to serve in divers offices, and for terms of office fixed by law; that among other officers so to be elected pursuant to law, was a person to be elected for the office of mayor of said city, and such person so to be elected as mayor was to be chosen and elected to serve a term of two years as mayor of said city; that among the persons named to be voted for by the voters of said city of, county of and state of Illinois, for the office of mayor of said city, at said election, was the said C, defendant hereinbefore named; and that said defendant and your petitioner were voted for by divers numbers of voters of said city of, for the office of mayor, at said election on the day of, 19..

That when the said defendant and your petitioner were so voted for as last above set forth, they were so voted for at said election so held as above set forth in all the various election precincts, districts and wards in the said city, which said precincts, districts and wards numbered in all election precincts, and which said election precincts were all situated within the limits of said city of, in the county of and state of Illinois; and that at said election the polls in said precincts were duly opened as required by law, and in said precincts ballots were cast by the voters of said city for the offices named in said ballots, which said ballots were prepared in pursuance to law and submitted to the voters of said city.

That about the hour of .. o'clock .. M., of said day, in pursuance of law, the polls were closed; and that the judges and clerks in the said several election precincts of said city then and there proceeded, according to law, to count, canvass, tabulate and report the number of votes at the polls cast at said election, and the number of votes that were then and there cast for each of the persons so voted for at said election.

That the said judges and clerks of said election in the several precincts, at the close of said count, so far as by them said count was made, then and there prepared, and in writing tabulated the number of votes cast for each of the persons voted for by ballots in said respective precincts, deposited by the

voters of said city for the different officers then and there voted for, including the number of votes then and there cast for mayor then and there voted for, and made out the returns thereof and returned the same to the city clerk of said city as required by law.

That after the polls were closed it was, and it then and there became, the duty of the judges and clerks of election, in each respective precinct in said city of, to correctly, impartially, and legally count, canvass, tabulate, tally, report, and certify the number of ballots cast at said election for each of the several persons voted for at said election; to correctly, fairly and truly report and certify the number of ballots cast at said election for each of the persons voted for at said election; and to correctly, fairly and properly report and certify the result of said count, canvass and poll of said ballots.

But your petitioner charges, upon information and belief, that the said judges and clerks at divers of the said election precincts, neglected, failed and refused to do their duty in this behalf; that in counting the said ballots so cast by the said voters for the persons named on the said ballots, and particularly in counting the votes for C, defendant, and your petitioner, and in tabulating, polling, reporting and certifying the same, the judges and clerks failed, neglected and refused to count, tabulate, poll, report and certify said votes fairly, impartially and correctly; that in the canvass of said votes divers judges and clerks of said election then and there made gross errors, omissions and mistakes, and then and there fraudulently failed and refused to correctly canvass, count, tabulate, and certify said ballots; and that the said judges and clerks of election then and there signed and subscribed certain certificates, which by reason of the many errors, omissions and mistakes, and by reason of the fraud and collusion of the said judges and clerks, failed to show and did not show the true, real and correct vote as the same was cast by the voters of the said city of, and as shown by the said ballots, as the said ballots were cast for the said C, and your petitioner.

That during the count of the votes so made by the said judges and clerks of election as aforesaid, the said judges and clerks refused to count a large number of legal votes which were then and there cast for your petitioner, and unlawfully, incorrectly and fraudulently marked the said ballots so cast for your petitioner "Defective;" that said judges and clerks did then and there refuse to count for your petitioner a large number of ballots that were cast for your petitioner by legal voters in said city, and which said ballots so unlawfully, improperly, and wrongfully rejected were marked "Objected to;" that at said election, said judges and clerks permitted illegal ballots to be cast by persons who were not qualified voters of said city of, and said judges of election received

and counted the said illegal votes for the defendant C; that the said judges and clerks then and there counted for the defendant a large number of legal votes which were cast for your petitioner, and refused and neglected to count for your petitioner a large number of legal votes that were cast for him, and made return thereof, of said votes so illegally cast, and of said votes so illegally, incorrectly and wrongfully counted, wherefore and whereby the said canvass of the said votes at said election, and the said election returns and the certificates thereof from each and all of the said election precincts in said city, as made by said judges and clerks at said election and returned by them to the city clerk as aforesaid, were untrue, incorrect, fraudulent and unlawful; and that the said judges and clerks committed in the conduct of said election and in the counting of the ballots, and in the canvass and return of the votes cast at said election, many other divers, unlawful and erroneous acts, wherein and whereby the said returns of the said election, as made and certified by them, were incorrect, incomplete, and erroneous, and did not show the correct number of lawful votes cast for the defendant at said election, or the correct number of lawful votes cast for your petitioner at said election.

Your petitioner further represents that when the said canvass of the said ballots was completed as aforesaid by the said judges and clerks of election at said election in each of the said precincts in the said city of, and was returned as completed by the said judges and clerks, the said returns and the said ballots and the poll-lists and the tally-sheets were duly sealed up by said judges and clerks, and returned to the city clerk of the said city of, within the time and as required by law, where the said ballots and returns have remained in the custody of the said city clerk from that time hitherto, as provided by law, and where they have been safely guarded and protected, and preserved, according to law, and where said ballots and returns now are.

That thereafter, to wit, on the day of, 19. . ., within the time required by law, the said city council of the said city of, said city council then and there sitting as the canvassing board for said city, for said election, examined the said returns of said election, as so returned by the judges and clerks of said election, and canvassed the same, and declared the result of said election, as shown by said returns as required by law.

That it then appeared, at the said canvass of the said returns as aforesaid by the said city council, and the fact was, that at the said election herein referred to, and at which the ballots hereinbefore referred to were cast, there were candidates for the office of mayor, and said candidates were B the petitioner, C the defendant, T and E, who were voted for

by the electors of the city of, at said election, and no other persons were voted for for the office of mayor at said election.

That at the canvass of the returns of said election by the city council of the said city of, as hereinbefore set out, it appeared, and the fact was, that the number of votes according to the returns submitted to said city council by the judges and clerks of election precincts of the said city of, as herein set forth, cast for the said B, the petitioner, was, and the number cast for the said C was, and the number of votes cast for the said T was, and the number of votes cast for the said E was

That the number of votes so returned by the judges and clerks of election constituted the result of the said election for mayor of said city of, at said election, as the same were canvassed and declared by the said city council; and that after said city council had canvassed said returns, the said city clerk of said city of did thereupon enter said result of record, and did then and there prepare a certificate of election, based upon said canvass, to the person certified thereon to have received the highest number of votes, to wit, the said city clerk did prepare and deliver to said C, the defendant, a certificate of election to the office of mayor of the said city of, which said certificate of election was based upon the said canvass of the returns of said election as aforesaid.

That the statement, declaration and certificate of election aforesaid was issued to the said C as the result of inspection, compilation, tabulation, and testing of the returns made to said city council as such canvassing board, by the judges and clerks of the various election precincts for the city of, as hereinbefore set forth; that said statement, declaration, and certificate of election were not based upon an inspection of any ballots cast at said election; that any and all errors or mistakes, omissions or frauds made in the count of said ballots and returns of said judges and clerks of said election, entered into, caused and constituted the result indicated and declared by said canvassing board; that said canvassing board did not correct, alter, or in any manner eliminate any errors in the count of the ballots made by the judges and clerks of the election; and that all errors so made by the judges and clerks of election, remained as such errors, and became the cause and determined the result of said canvass and said declaration of election as set forth in said certificate.

Your petitioner further represents, upon information and belief, that at the said election there was a large amount of scratching and changes made by the voters upon the ballots

cast; that many voters did not vote a straight ticket; that many voters, in scratching their ballots, failed to indicate properly which of the several candidates for the office of mayor they then and there voted for; that in each and all of such precincts in said city many ballots which showed a vote for the defendant herein, and many ballots which legally and correctly showed a vote for the petitioner herein were marked "Defective" and were not counted for the petitioner herein; that many ballots which legally and properly showed a vote for the petitioner herein were marked "Objected to" and were not counted for the petitioner herein; that many ballots which were defective, illegal, and objectionable, and did not show a vote for defendant herein, were counted as votes for the defendant herein; that in all the precincts in said city more votes were counted for the defendant herein than were deposited by the voters in said respective precincts; that in each and all of the said precincts in said city votes were cast by persons who were not legal voters in said city and legal voters in the precincts in which their votes were cast, and said votes so cast by said illegal voters were counted for the defendant herein; that in each and all of the said precincts in said city certain divers persons cast more than one vote for the office of mayor, and certain divers persons voted in said city at said election, in more than one precinct; that the number of persons so illegally voting, and repeating, and casting more than one vote for each office was large, to wit, not less than; that the said votes so illegally cast by repeating and by persons voting in said election who were not legal voters at said election were counted for the defendant; and that many other gross errors were then and there made in the count, tally and return, and certificate of said vote.

That the errors, mistakes and omissions above set forth so made by the judges and clerks of election in the various precincts of the said city of, in determining the vote cast for the candidates for mayor, and in returning the vote for said candidates in said precincts in said city of, then and there caused to be improperly and incorrectly tabulated, counted, and certified a large number of votes; by reason of which errors, the said defendant was incorrectly and unlawfully certified to have received more than votes in excess of the actual number of votes properly and lawfully cast for him by the voters of the said city of, at said election; and the petitioner, by reason of said errors, omissions and mistakes, was certified to have received a large number, to wit, votes less than the number of ballots actually, legally, and properly cast for him by the legal and qualified voters of the said city of, at said election.

That at the time of said election on the day of,

19., the said city of was, and at the day of the filing of this petition, and now is, divided into wards, numbering from one to inclusive; that each ward is, and was at the date of said election, a voting precinct for the purposes of said city election.

That in the first ward of the city of, a large number of votes were cast by the voters of said ward, to wit, votes, and that of the ballots so cast were lawfully cast for your petitioner; but that the said judges and clerks of election of said ward refused to count correctly, tally, and return said votes so lawfully cast for your petitioner, and unlawfully and incorrectly returned and certified that only votes had been cast for your petitioner by the voters in said ward, which said return was false and untrue. Also that in said first ward ballots that were cast for, your petitioner, were, through error and mistake in counting and tallying, not counted; that ballots that were cast for your petitioner and should have been counted for him, were counted and returned as having been cast for the defendant; and that votes were cast in said first ward by persons who were not legal voters in said ward, and that said illegal votes were cast for the defendant and were counted by said judges and clerks, and returned as legal votes cast for the defendant.

That in the third ward in said city of, votes were cast by the voters in said ward at said election; that of the lawful votes so cast votes were cast by the voters of the said ward for your petitioner, but that the said judges and clerks of election in said ward refused to count and correctly tally said votes so lawfully cast for your petitioner, and unlawfully and incorrectly returned and certified that only votes were cast by the voters at said election for your petitioner; that ballots that were marked for your petitioner were wrongfully and erroneously counted for the defendant; that divers persons, to wit, more than persons, who were not legal voters in said third ward, voted in said ward at said election, and cast their said votes for the defendant, and that the said illegal votes so cast as aforesaid were counted and returned by the judges and clerks of said precinct as lawful votes cast for the defendant; that the said judges and clerks of said election in said third ward, by their returns and certificate, certified that there were cast by the legal voters of said ward, votes more for the defendant than were cast for your petitioner, whereas there was a large number of votes counted for the defendant that were not cast for him, and a less number of votes counted for the petitioner than were cast for him, and votes counted for the defendant that should have

been counted for other candidates; that ballots that were defective and should not have been counted were counted and returned by the said judges and clerks, as votes cast for the defendant; and that divers other gross errors and miscounts were made in the said count and return by the judges and clerks in the said third ward, whereby your petitioner was deprived of and did not receive in the said count and returns over legal votes in said ward that were cast for him by the voters of said ward.

That in the second, fourth, and fifth wards, ballots that were defective and were not legal ballots, and should not have been counted, were counted for the defendant, and ballots that were marked for your petitioner and were legal ballots, and should have been counted for your petitioner, were marked "Defective" or "Objected to" and were rejected by the said judges and clerks and not counted for the petitioner, to wit: in the second ward, ballots that were cast for your petitioner were counted by the judges and clerks for the defendant, and ballots that were defective and should not have been counted were counted for the defendant, and ballots that were cast for your petitioner were rejected as defective and not counted for your petitioner; in the fourth ward, the clerks did not keep a correct tally of the votes cast, as the same were counted, and by reason of said incorrect tally votes were returned for the defendant more than were cast for him, and votes less were returned for the petitioner than were cast for him; and in the fifth ward votes were cast by persons who were not legal voters in said ward, were counted as legal votes and were returned as lawful votes cast for the defendant.

That in the said election and the count of the ballots cast at said election, and in the tally and returns of said votes, there were other and divers other miscounts, errors, frauds and irregularities, whereby there was returned a very large number of votes more for the said defendant than were cast for him, and a large number of votes less for your petitioner than were cast for him; and your petitioner avers and charges, and upon information and belief represents the fact to be, that there was cast at said election for your petitioner a larger number of legal votes than was cast for the defendant, and that there was cast for your petitioner a larger number of legal votes than was cast for any other candidate that was voted for at said election, and that your petitioner received a plurality over every other candidate voted for at said election, of all the votes cast at said election for the office of mayor.

Wherefore, your petitioner represents and charges that the said returns of said election, as returned and canvassed and declared as aforesaid, were false and untrue; that the said

C did not receive a higher number of votes at said election for the office of mayor than did your petitioner, but that the said C received a less number of votes at said election than did your petitioner; that the said C did not receive a plurality of the votes cast at said election over the number cast for your petitioner; that the said C was not elected to said office of mayor at said election by the legally qualified electors of said city of, at said election, but that your petitioner was elected by the legally qualified electors, to the office of mayor at said election; that your petitioner was the person who received the highest number of legal votes that were cast at said election for the office of mayor, and did then and there at said election receive a higher number of votes than were cast for the said C, and did receive a higher number of votes than any other person who was voted for for said office of mayor at said election; that your petitioner was duly and legally elected to the office of mayor at said election, and should have been found and declared elected to said office of mayor by the said city council of the said city of, as such canvassing board, and a certificate of election, to which he was justly and lawfully entitled, should have been duly issued to him accordingly; and that your petitioner files this, his statement, setting forth the points on which he will contest the said election of the said C as mayor of the said city of, as hereinabove set forth, and which said points are hereinabove set out and specified.

Inasmuch, therefore, as your petitioner is without remedy, except in this honorable court, or in a court of concurrent jurisdiction, and to the end that the said C, who is made a party defendant to this petition, may be required to make full and direct answer to the same (but not under oath, the answer under oath being hereby expressly waived), and that the said election returns and the said ballots cast at the said election for mayor in the said city of, and the returns of said election so held in the city of, on the day of, 19.., as aforesaid, may be brought into this court and that a recount of said ballots may be had and taken under the direction and supervision of this honorable court; and to the end that the many errors, frauds and inaccuracies in said election, and the returns thereof, and the many errors and miscounts, frauds and inaccuracies in the count and return of said ballots cast at said election may be inquired into, and a full, true and correct count of the same be had, under the direction and supervision of this court, as provided by law, and that the true and correct result of said election for the said office of mayor of the city of be ascertained, determined and declared, and that the many inaccuracies, errors, and mis-

takes in said count of said ballots and the returns thereof be corrected and the declaration of the board of canvassers of the vote cast at said election for the said C and your petitioner, and the election of the said C be set aside, and the certificate of election heretofore issued to said C be declared null and void, and that this honorable court shall find, determine and declare and decree that your petitioner was duly and lawfully elected at said election to the office of mayor of said city of, for the term of years; and that your petitioner may have such other and further relief in the premises as to your honors shall seem meet, may it please your honors to grant the writ of summons, directed to the sheriff of the county of, commanding him that he summon the defendant C to appear before said court on the first day of the next term thereof, to be held at the court house in, county, then and there to answer this petition.

And your petitioner will ever pray, etc.

.....
 Petitioner.
 Solicitor for petitioner.

State of Illinois, }
 county. } ss.

I,, the petitioner, who signed the above and foregoing petition, hereby state that I have examined the same and had the same read to me and that I know the contents thereof; that the same is true, as I am informed and believe; and that I have been credibly informed that the same is true and do believe the same to be true.

Subscribed, etc.

3343 Amendment

Additional grounds of contest of an election may be added to the original petition by amendment.³⁶ The contestant is not confined to the points contained in his original statement, but may avail himself of any amendment or pleading to meet the tactics of his opponent in order to bring before the court the real points of the case.³⁷

SUMMONS

3344 Return day

In election contests the summons, in Illinois, must be made returnable as in chancery to the next term of court after the

³⁶ Brents v. Smith, 250 Ill. 526.

³⁷ Dale v. Irwin, 78 Ill. 170, 178 (1875).

date thereof, or to the next succeeding term thereof.³⁸ The summons may properly be made returnable to the probate and not the law term of the county court.³⁹

3345 Service

A common law summons, served in accordance with chancery practice, is appropriate in Illinois.⁴⁰

DEFENSES

3346 Appearance

(Caption)

I hereby enter the appearance of C, the defendant, in the above entitled cause, and of myself as his solicitor; and I ask the usual time within which to except, demur, plead or answer to the petition of B, the petitioner herein.

.....
Solicitor for said defendant.

3347 Demurrer, waiver

An answer after a demurrer has been overruled waives all questions that were or might have been raised by the demurrer, except matters of substance which show that the petitioner is not entitled to the relief sought.⁴¹

3348 Answer, form (Ill.)

(Caption)

The answer of C, the defendant, to the petition of B, the petitioner.

This defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said petition contained, for answer thereto, or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer thereunto, answering says:

1, This defendant neither admits nor denies that on
....., 19.., the petitioner, B, was a citizen of the United

³⁸ Cavanaugh v. McConochie, 134 Ill. 516, 521 (1890); Sec. 114, c. 46, Hurd's Stat. 1909, p. 972; Sec. 9, c. 22, Hurd's Stat. 1909, p. 251.

³⁹ Cavanaugh v. McConochie, 134 Ill. 520.

⁴⁰ Quartier v. Dowiat, 219 Ill. 328; Sec. 114, c. 46, Hurd's Stat. 1903; Sec. 8, c. 22, *Ibid.*

⁴¹ Arnold v. Keil, 252 Ill. 342.

States, a citizen of the state of Illinois, and a resident and legally qualified elector and legal voter in the city of , in the county of , and state of Illinois; and he neither admits nor denies that said petitioner has been such citizen, resident and legally qualified elector and voter in said city, county and state for more than years, or any other period, immediately preceding said day of , 19..; and he neither admits nor denies that said petitioner has since then been at any time or still remains or is such legally qualified elector and legal voter. This defendant admits that said petitioner was then and now is of lawful age, to wit, of the age of years; and he neither admits nor denies that petitioner then and there was and now is in all respects eligible to the office of mayor of said city of This defendant admits that said city of is a city in said county of , duly incorporated and managed as a city under the general incorporation laws of said state of Illinois, to wit, an act entitled "An act to provide for the incorporation of cities and villages," approved , 1...., and in force , 1...., and all acts amendatory thereof.

2, This defendant admits that on the day of , 19.., an election was held in said city of , for the election of various city officers to serve in divers offices, and for terms of office fixed by law, and that among other officers so to be elected was a person to be elected for the office of mayor of said city to serve a term of years as such; that among the persons named to be voted for by the voters of said city, for said office of mayor, at said election, was said defendant; and that the name of said petitioner was printed on the ballots used in said election as one of the candidates for said office of mayor: but this defendant does not know, and neither admits nor denies, that said petitioner was properly nominated, or was a lawful candidate, or that his name was lawfully on such ballots as such candidate. This defendant admits that he and said petitioner were voted for by divers numbers of voters of said city, for said office of mayor, at said election.

3, This defendant admits that he and said petitioner and other candidates for said office of mayor were voted for at said election and that said election was held in all the various election precincts, districts and wards in said city, and that said precincts, districts and wards constitute election precincts or districts, that is, one for each of said wards, and were all situated within the limits of said city, and together constituted all the election precincts in and of said city; that there was one polling place in each of said precincts; that the polls of the first and third of said precincts, being identical respectively with the first ward and third

ward of said city, were duly opened as required by law; and that the polls of said other precincts were opened at said election; but this defendant neither admits nor denies that the same were opened as required by law. This defendant admits that in all of said precincts ballots were cast by the voters of said city at said election for the offices named in said ballots; and neither admits nor denies that said ballots were, in the respect that they contained the name of said petitioner as a candidate for said office of mayor, prepared in pursuance to law; but admits that said ballots were in all other respects prepared in pursuance to law; and admits that said ballots were submitted to the voters of said city.

4, This defendant admits that on or about the hour of o'clock M., of said day, in pursuance of law, the polls of said first and third precincts were each closed; but neither admits nor denies that the polls of the second, fourth and fifth precincts aforesaid were so closed at said time. This defendant, except so far as, and to the extent that his allegations hereinafter contained are to the contrary thereof, admits that the judges and clerks of said several election precincts of said city then and there proceeded according to law to count, canvass, tabulate and report the number of votes cast at said polls respectively at said election, and the number of votes that were then and there cast for each of the persons so voted for at said election.

5, Except as hereinafter alleged to the contrary, this defendant admits that the said judges and clerks of said election in said several precincts, at the close of said count, then and there prepared a writing which tabulated the number of votes cast for each of the persons voted for by ballots in said respective precincts, deposited by the voters of said city for the different offices then and there voted for, including the number of votes then and there cast for mayor, and for each candidate for mayor; and made out the returns thereof and returned the same to the city clerk of said city as required by law.

6, This defendant admits that after each of said polls was closed it became the duty of the judges and clerks of election in each of said respective precincts to correctly, impartially and legally count, canvass, tabulate, tally, report and certify the number of ballots cast at such precinct for each of the several persons voted for, and the result of said count, canvass, tabulation and tally to report and certify.

7, This defendant, except as hereinafter alleged to the contrary, does not know, and neither admits nor denies, that said judges and clerks at divers of said election precincts, neglected, failed and refused to do their duty in counting said ballots so cast for the persons named thereon, and for defendant and petitioner; and neither admits nor denies that in tabulating, polling, reporting and certifying said ballots said

judges and clerks failed, neglected and refused to count, tabulate, poll, report, and certify said votes fairly, impartially and correctly; and except as aforesaid, neither admits nor denies that they then and there made gross errors, omissions and mistakes, and fraudulently failed and refused to correct the canvass, count, tabulate and certify said ballots, and signed certificates which by reason of said supposed errors, omissions, mistakes, fraud and collusion failed to show the correct vote as the same was cast by the voters of said city, and as shown by said ballots, as cast for said defendant and petitioner; but this defendant alleges upon information and belief that what if any of such errors, omissions, mistakes, fraud and collusion occurred operated in favor of said petitioner and resulted in each instance in showing that petitioner had received more votes than had in fact been cast for him, and that defendant had received less votes than were in fact cast for him, for said office of mayor.

8, This defendant denies that during said count of said votes said judges and clerks of election refused to count a large number or any of the legal votes then and there cast for said petitioner, and unlawfully, incorrectly and fraudulently marked the said ballots so cast for petitioner "Defective;" but on the contrary thereof, this defendant, upon information and belief, alleges the fact to be that during said count of the votes cast in each of said election precincts, the judges and clerks of each of said precincts refused to count a large number of legal votes, to wit, legal votes that were then and there cast for said defendant for mayor, and unlawfully, incorrectly and fraudulently marked the ballots so cast for said defendant "Defective." And said defendant denies that said judges and clerks did then and there refuse to count for petitioner a large number or any of the ballots that were cast for petitioner by legal voters in the said city, and unlawfully, improperly and wrongfully rejected same and marked same "Objected to;" but this defendant on the contrary, on information and belief alleges that said judges and clerks then and there in each of said precincts refused to count for defendant a large number of ballots that were cast for defendant for mayor in each of said precincts, to wit, such ballots, cast by legal voters, and which said ballots so unlawfully, improperly and wrongfully rejected were marked "Objected to." This defendant admits that at said election ballots were cast by persons who were not qualified voters of said city, and denies that the same were counted for said defendant; but on the contrary thereof, charges on information and belief and alleges that in each of said election precincts a large number of ballots, to wit, ballots, were cast by persons who were not then and there qualified voters of said city, and that in each precinct said illegal ballots were received

and counted by the judges and clerks of election for said petitioner. This defendant denies that said judges and clerks then and there counted for said defendant a large number of legal votes which were cast for said petitioner; but on the contrary thereof on information and belief alleges that the judges and clerks of each election precinct then and there counted for said petitioner a large number of legal votes, to wit, legal votes, that were cast for said defendant. This defendant denies that said judges and clerks then and there refused and neglected to count for petitioner a large number or any legal votes that were cast for petitioner, but on the contrary thereof on information and belief alleges that in each of said election precincts said judges and clerks thereat refused and neglected to count for said defendant a large number of legal votes, to wit, legal votes, that were cast for said defendant, for said office of mayor. This defendant admits that said judges and clerks of each election precinct made return of said votes as counted by them and that such returns constituted the basis of the canvass of the votes at said election and of the declaration of the result thereof, and of the certificates thereof, so that the same did not show the correct number of lawful votes cast at said election for said office of mayor for said defendant and petitioner; but this defendant alleges that by reason thereof the result of the election as to who was elected to the office of mayor thereat was not changed but only it was made to appear that said petitioner had more votes and said defendant had less votes than was true, and it was made to appear that the plurality of the votes for said defendant over the votes for the petitioner and said other candidates for mayor was less than it in fact was.

9, This defendant admits that the returns, ballots, poll-lists and tally-sheets of each of said election precincts were duly sealed up by said judges and clerks respectively, and by them duly returned to the city clerk of said city of, within the time required by law, and that all of the same, except said ballots, were safely guarded, protected and preserved as required by law from thence to and until and including the time when said returns were canvassed by the city council of said city and the result of said election declared, and the certificate of election issued to this defendant as hereinafter alleged; but this defendant denies that after or since the time of said final canvass, declaration of results and issuing of said certificate, said returns, ballots, poll-lists and tally-sheets have been safely guarded, protected and preserved as required by law; that on the contrary thereof, this defendant on information and belief alleges that since said final canvass and the issuing of said certificate said ballots, poll-lists, tally-sheets and returns have not been safely guarded, protected and preserved as required by law.

10, This defendant admits that the city council of said city of thereafter, to wit, on the day of, 19.., within the time required by law, while then and there sitting as the canvassing board of said city, for said election, examined the said returns of said election, as so returned by the judges and clerks of said election, and canvassed the same, and declared the result of said election, as shown by said returns as required by law. This defendant further answering alleges that by said canvass it appeared, and said city council then and there declared as a part of the result of said election, that this defendant was duly elected to the said office of mayor of said city and thereupon a certificate of such election to such office was issued to him, and within the time required by law he took the official oath and furnished the official bond as such mayor, and the same was approved by said city council, all as required by law, and he did qualify as, and now is the mayor of said city, and is acting as such.

11, This defendant admits that at said canvass of said returns by said city council it then and there appeared, and the fact was, that at said election there were candidates for said office of mayor, namely, the petitioner, this defendant, one T and one E, who were voted for by the electors of said city at said election, and no other person or persons were voted for for the office of mayor of said city, at said election.

12, This defendant admits that at the said canvass of said returns of said election by said city council it appeared, and the fact was, according to said returns, that the number of votes cast for said petitioner was; the number of votes cast for this defendant was; the number of votes cast for said T was; and the number of votes cast for said E was

13, This defendant admits that the number of votes returned by the judges and clerks of said election constituted the result of said election for mayor of said city as canvassed and declared by said city council, and that after said city council had canvassed said returns said city clerk did thereupon enter said results of record, and did then and there issue his certificate of election, based upon said canvass, and delivered the same to this defendant, thereby certifying that this defendant was at said election elected to said office of mayor of said city.

14, This defendant admits that the said canvass of said returns of said election by said city council was not based upon an inspection of any ballots cast at said election, but was based upon said returns of said election as made by said judges and clerks; and that said city council as such canvassing board did not correct or alter what, if any, errors there might be in the count of said ballots by said judges and clerks of election.

15, This defendant, except as herein alleged to the contrary,

does not know, and neither admits nor denies, that at said election there was a large amount of scratching and changing made by the voters upon the ballots cast at said election; that many voters did not vote a straight ticket; and that many voters, in scratching their ballots, failed to indicate properly which of the several candidates for the office of mayor they then and there voted for. And this defendant denies that in each and all or any of said election precincts many or any ballots which showed a vote for said petitioner were counted as showing a vote for said defendant; he denies that many or any ballots which legally and correctly showed a vote for said petitioner were marked "Defective" and were not counted for said petitioner; he denies that many or any ballots which legally and properly showed a vote for said petitioner were marked "Objected to" and not counted for said petitioner; he denies that many or any ballots which were defective, illegal and objectionable, and did not show a vote for said defendant, were counted as votes for said defendant; he denies that in all or any of said precincts more votes were counted for said defendant than were deposited by the voters in said respective precincts; he denies that in each and all or any of said precincts votes were cast and counted for the defendant herein which were cast by persons who were not legal voters in said city and legal voters in the precinct in which their votes were cast; he denies that in each and all or any of said precincts divers persons cast more than one vote that was counted for said defendant for said office of mayor; he denies that certain divers persons whose votes were counted for said defendant voted at said election in more than one precinct.

Further answering, this defendant on information and belief alleges that in each and all of said precincts in said city many ballots, to wit, ballots which showed a vote for said defendant for mayor were each counted as showing a vote for said petitioner for mayor; that many ballots, to wit, ballots, which legally and correctly showed a vote for said defendant for mayor were marked "Defective" and were not counted for said defendant; that many ballots, to wit, ballots, which legally and properly showed a vote for said defendant for mayor were marked "Objected to" and were not counted for said defendant for mayor; that many ballots, to wit, ballots, which were defective, illegal and objectionable, and did not show a vote for said petitioner for mayor were counted as votes for said petitioner for mayor; that in all the precincts in said city more votes were counted for said petitioner for mayor than were deposited by the voters in said respective precincts; that in each and all of said precincts many votes, to wit, votes, were cast by persons who were not legal voters in said city and legal voters in the precinct in which their votes were cast, and said votes so cast by said illegal

voters were counted for said petitioner for mayor; that in each and all of said precincts in said city certain persons, to wit, persons, cast more than one vote for the office of mayor, and certain persons, to wit, persons, voted in said city at said election in more than one precinct for the office of mayor, and the number of persons so illegally voting and repeating, and casting more than one vote for said office was large, to wit, not less than, and said votes so illegally cast by repeating and by persons voting in more than one precinct, and by persons voting at said election who were not legal voters at said election were counted for said petitioner; but notwithstanding the same, this defendant, by the count of said ballots as so made, and the returns of said election based thereon, and the canvass of said returns, had more legal votes for said office of mayor than any other candidate for said office at said election, including said petitioner.

16, This defendant denies that by reason of any errors, mistakes and omissions or matters aforesaid, he was incorrectly and unlawfully certified to have received more than votes, or any vote, in excess of the actual number of votes properly and lawfully cast for him by the voters of said city at said election; he denies that said petitioner by reason of any error, omissions or mistakes, was certified to have received a large number or any number of votes less than the number of ballots actually, legally and properly cast for him by the legal and qualified voters of said city at said election. Further answering, this defendant upon information and belief alleges that the errors, mistakes and omissions above set forth so made by the judges and clerks of election in the various precincts of said city in determining the votes cast for the candidates for mayor, and in returning the vote for said candidates in said precincts, then and there caused to be improperly and incorrectly tabulated, counted and certified a large number of votes, to wit, votes; by reason of which errors, the said petitioner was incorrectly and unlawfully certified to have received more than votes in excess of the actual number of votes properly and lawfully cast for him for mayor by the voters of said city at said election; and that said defendant, by reason of said errors, omissions and mistakes, was certified to have received a large number, to wit, votes less than the number of ballots actually, legally, and properly cast for him for mayor by the legal and qualified voters of said city at said election.

17, This defendant admits that at the time of said election on the day of, 19.., the said city of was, and before and ever since has been, and now is, divided into five wards, numbered from one to five inclusive; and that each ward then and during all that period was and is a voting

precinct for the purposes of city elections, and of said city election.

18, This defendant denies that in the first ward of said city votes were cast; he denies that of the ballots cast were lawfully cast for said petitioner and that the judges and clerks of election of said ward refused to count correctly, tally and return the votes lawfully cast for said petitioner; but he admits that they refused to count, tally and return that votes were cast for petitioner; he admits that they counted returned and certified that only votes had been cast for petitioner by the voters in said ward, and state the fact to be that said petitioner did not receive as many as votes at said election in said ward; he denies that in said first ward ballots or any ballots cast for petitioner were not counted; he denies that ballots or any ballots that were cast for petitioner in said ward were counted and returned as having been cast for the defendant; and he denies that votes or any votes were cast in said first ward and counted for the defendant which were cast by persons who were not legal voters in said ward. This defendant on information and belief alleges that of the ballots actually cast in said first ward at said election were lawfully cast for this defendant; but that the said judges and clerks of election of said ward refused to count, tally and return said votes so lawfully cast for this defendant, and returned and certified that only votes had been cast for this defendant for mayor by the voters in said ward; that in said first ward ballots that were cast for this defendant were, through error and mistake of counting and tallying, not counted; that ballots that were cast for this defendant which should have been counted for him were counted and returned as having been cast for petitioner; that votes were cast in said first ward by persons who were not legal voters in said ward and said illegal votes were cast for said petitioner and were counted by said judges and clerks, and returned as legal votes cast for said petitioner; that legal votes cast for this defendant were marked "Defective" and not counted; that legal votes cast for this defendant were marked "Objected to" and not counted; that ballots that were defective in that they lacked any official endorsement thereon, and lacked the endorsement thereon of the initials of any judge of election, and had thereon distinguishing marks, and should not have been counted, were counted for said petitioner; that persons voted at said precinct for said petitioner more than once at said election, and each voted twice thereat, and both ballots of each of such persons were counted as a vote for said petitioner for mayor; that persons voted at said first ward for petitioner and their ballots were counted for him for mayor, each of whom resided in and had already

voted for him in another of said wards; that a large number, to wit, more votes were counted for said petitioner at said first ward precinct than had been cast for him for mayor; and that but votes were legally cast for said petitioner for mayor at said first ward precinct and votes were counted, returned and certified as cast for him.

19, This defendant does not know, and therefore neither admits nor denies, that in said third ward in said city votes were cast by the voters in said ward at said election, but admits that votes were so cast; he denies that of the lawful votes cast votes were cast by the voters of said ward for said petitioner; he denies that said judges and clerks refused to correctly count and tally the legal votes cast for said petitioner, but admits that they did return and certify only votes as cast for petitioner, and states that votes were more votes than said petitioner actually received; he denies that or any ballots that were marked for petitioner were counted for said defendant; he denies that or any persons who were not legal voters in said ward voted therein at said election for said defendant, or that the same were counted and returned as lawful votes for said defendant; he admits that said judges and clerks of said election in said third ward, by their returns and certificate, certified that there were cast by the legal voters of said ward votes more for said defendant than were cast for said petitioner, and states that in fact the legal votes cast for this defendant in said ward at said election for mayor exceeded the legal votes cast then and there for petitioner by much more than votes; he denies that there was a large number of votes counted for said defendant that were not cast for him; he denies that a less number of votes were then and there counted for said petitioner than were cast for him; he denies that votes were counted for said defendant that should have been counted for other candidates; he denies that ballots that were defective were counted and returned as votes for said defendant; he neither admits nor denies, except as herein alleged to the contrary, that errors and miscounts were made in said count and returns by the judges and clerks in said third ward, but denies that if any such errors and miscounts occurred, said petitioner was thereby deprived of and did not receive in said count and returns or any legal votes in said ward that were cast for him by the voters of said ward.

This defendant further answering on information and belief alleges that at said third ward election precinct at said election, ballots were cast that were marked as votes for this defendant and were erroneously counted as votes for said petitioner; that more than persons who were not then and there legal voters in said third ward voted in said ward at said election and cast their said votes for said petitioner for

mayor, which votes so cast were counted and returned by the judges and clerks of said precinct as lawful votes cast for said petitioner; that said judges and clerks of said election in said third ward, by their returns and certificate, certified that there were cast by the legal voters of said ward votes more for the defendant than were cast for said petitioner, whereas there was a large number of votes counted for said petitioner that were not cast for him, and a less number of votes counted for said defendant than were cast for him, and votes counted for said petitioner that should have been counted for other candidates; that ballots that were defective and should not have been counted were counted and returned by said judges and clerks as votes cast for said petitioner; that divers other errors and miscounts were made in the said count and returns by said judges and clerks in said third ward, whereby this defendant was deprived of and did not receive in said count and returns over legal votes in said ward that were cast for said defendant for mayor by the voters of said ward; and that according to the legal votes actually cast, said judges and clerks of said third ward by their returns and certificate should have certified that there were cast by the legal voters of said ward votes more for said defendant than were cast for said petitioner.

20, This defendant denies that in the second, fourth, and fifth ward ballots were counted for said defendant that were defective, and were not legal ballots and should not have been counted; he denies that ballots that were marked for said petitioner and were legal ballots and should have been counted for petitioner were marked "Defective" or "Objected to" and were rejected by the judges and clerks of said precincts and not counted for said petitioner; he denies that in the second ward or any ballots that were cast for said petitioner were counted by said judges and clerks for said defendant; he denies that or any ballots that were defective and should not have been counted were counted for said defendant; he denies that or any ballots that were cast for said petitioner were rejected as defective and not counted for said petitioner; he denies that in the fourth ward votes or any votes were returned for the defendant more than were cast for him; he denies that in said fourth ward votes less were returned for said petitioner than were cast for him; he denies that in the fifth ward more votes or any more votes were returned as cast for the defendant than were cast for him; he denies that in said fifth ward less votes or any less votes were returned as cast for petitioner than were cast for him; he denies that in the second ward there were counted as lawful votes for said defendant votes or any votes which were cast by persons who were not legal voters; he denies that in the fourth ward there were counted as legal

votes for the defendant and returned as votes cast for the defendant votes or any votes cast by persons who were not legal voters in said ward; and he denies that in the fifth ward there were counted as legal votes for defendant and returned as lawful votes cast for defendant votes or any votes cast by persons who were not legal voters in said ward.

This defendant further answering alleges on information and belief that in the second, fourth and fifth ward of said city respectively, at said election, ballots that were defective and were not legal ballots, and should not have been counted, were counted as votes for said petitioner for mayor; that ballots that were marked as votes for this defendant and were legal ballots, and should have been counted for this defendant, were marked "Defective" or "Objected to" and were rejected by said judges and clerks and not counted for this defendant; that in the second ward ballots that were cast for this defendant were counted by said judges and clerks as votes for said petitioner for mayor; that ballots that were defective and should not have been counted were counted as votes for said petitioner for mayor; that ballots that were cast for said defendant for mayor were rejected as defective and not counted for said defendant; that votes that were cast by persons who were not legal voters in said ward or city were counted as lawful votes for said petitioner; that in said fourth ward, by reason of errors in the count and tally of the votes cast, a large number, to wit, votes, were returned as votes for the petitioner for mayor more than were cast for him; that for the same causes votes less were returned for said defendant for mayor than were cast for him; that votes cast by persons who were not then and there legal voters in said ward were counted as legal votes for said petitioner for mayor, and returned as such; that in said fifth ward votes cast by persons who were not then and there legal voters in said ward were counted as legal votes for said petitioner for mayor, and were returned as such; and that by reason of errors in the count and tally of the votes cast more votes were returned as cast for said petitioner for mayor than were cast for him, and less votes were returned as cast for this defendant than were so cast for him.

21, This defendant denies that from any cause whatever there was returned a very large number of votes more for said defendant than were cast for him; he denies that a large number of votes less were returned for said petitioner than were cast for him; he denies that there were cast at said election for petitioner a larger number of legal votes than was cast for said defendant; he denies that there was cast for said petitioner a larger number of legal votes than was cast for any other candidate that was voted for at said election; and he denies that said petitioner received a plurality over every other candidate

voted for at said election, of all the votes cast at said election for the office of mayor. This defendant further answering alleges upon information and belief that in said election and the count of the ballots cast at said election, and in the tally and returns of said votes there were divers errors whereby there was returned a very large number of votes more for said petitioner as mayor than were so cast for him, and a large number of votes less for this defendant for mayor than were so cast for him; that there was cast at said election a larger number of votes for this defendant as mayor than was cast for said petitioner for mayor, and there was cast a larger number of legal votes for this defendant for mayor than was cast for any other candidate that was voted for at said election for mayor; and that this defendant received a plurality over every other candidate voted for at said election of all the votes cast at said election for the office of mayor.

22, Wherefore, this defendant submits, insists and alleges that said petitioner received a less number of votes at said election for the office of mayor than did this defendant; that this defendant received a higher number of votes at said election for said office of mayor than did said petitioner; that this defendant did receive a plurality of the votes cast at said election for mayor over the number cast for said petitioner; that this defendant was elected to said office of mayor at said election by the legally qualified electors of said city; that said petitioner was not elected by the legally qualified electors to said office of mayor at said election; that this defendant was the person who received the highest number of legal votes that were cast at said election for said office of mayor, and did then and there at said election receive a higher number of votes than were cast for said petitioner, and did receive a higher number of votes than any other person who was voted for for said office of mayor at said election; that this defendant was duly and legally elected to the office of mayor at said election and was properly found to be and declared elected to said office of mayor by said city council, as such canvassing board; and that said certificate of election was justly and lawfully issued to him.

23, And this defendant denies all and all manner of unlawful actions, wherewith he is by said petition charged, without this that there is any other matter, cause or thing in said petitioner's said petition contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain and prove as this court shall direct; and this defendant asks that he shall have the same benefit of any and all defenses as if he had demurred to said petitioner's peti-

tion; and this defendant denies that the petitioner is entitled to the relief, or any part thereof, in his said petition demanded, and prays the same advantage of his answer as if he pleaded or demurred to said petition; and now having fully answered said petition, this defendant prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

.....
Defendant.

By
his solicitor.

.....
Solicitor for said defendant.

EVIDENCE

3349 Result of election

In determining the result of an election contest, the ballots are the best evidence, if it affirmatively appears that they have been preserved according to law; if the ballots have been tampered with, the returns are entitled to greater weight; and if the evidence discredits the ballots and the returns, the true result of the election must be ascertained by a consideration of the ballots, returns and all of the attending circumstances.⁴² The undisputed return of the judges will be taken as *prima facie* evidence of the result of an election, unless the contestant has shown that the ballots have not been kept in accordance with the substantial requirements of the statute.⁴³

The mere failure to use the register of voters will not vitiate the returns of a precinct if such failure did not deprive the electors of the right of suffrage and no illegal votes were cast in consequence thereof.⁴⁴ The returns of a precinct should not be excluded merely because the regular judges did not appear and act at the election, if other persons were sworn and acted as judges.⁴⁵ The returns of a precinct, if not signed and certified by the judges or clerks as required by statute should not be received by the canvassing board and counted; but such an irregularity cannot be availed of in a proceeding to contest an election.⁴⁶

⁴² Roland v. Walker, 244 Ill. 129, 131, 137 (1910); Choisser v. York, 211 Ill. 59; Brents v. Smith, 250 Ill. 534; Arnold v. Keil, 252 Ill. 343.

⁴³ Graham v. Peters, 248 Ill. 50, 53, 54 (1910).

⁴⁴ Choisser v. York, 211 Ill. 65.

⁴⁵ Choisser v. York, *supra*.

⁴⁶ Choisser v. York, 211 Ill. 62, 63.

Clear and satisfactory evidence is required to show that there was no reasonable opportunity for unauthorized persons to interfere with the ballots when another method is pursued for their preservation than that which is prescribed by statute.⁴⁷

3350 Ballots, ambiguous

If a form of a ballot is not required to be prepared by the election officers and if the one submitted at an election is ambiguous, the voter may prepare the form of ballot for himself and use it instead of the one presented.⁴⁸

3351 Ballots, booths

A ballot is illegal if it is cast in a place other than the booth provided in substantial compliance with the statute.⁴⁹

3352 Ballots, cross

The voter must indicate his choice by a cross either in the circle at the head of a party ticket or in the squares opposite the names of the various candidates.⁵⁰ A ballot is void which shows that the voter had made no attempt to make a cross.⁵¹ A cross made by *indentation* of the paper with a broken pencil or hard substance leaving no color on the paper sufficiently designates the intention of the voter.⁵² An imperfect cross, a cross of which the lines intersect and cross slightly, in a circle or in a square of a ballot will not invalidate it.⁵³ A cross in form of capital "T" is sufficient.⁵⁴ If the lines meet but do not intersect or cross they do not constitute a cross. The letter "O" is not a cross.⁵⁵ A heavy line or a fraction is not a cross.⁵⁶ A cross upon the entire ticket invalidates it, although it is made in addition to the cross in the circle.⁵⁷ A cross after the name of a candidate and entirely outside the square invalidates the ballot.⁵⁸

⁴⁷ Graham v. Peters, 248 Ill. 56.

⁴⁸ People v. Sullivan, 247 Ill. 176, 184 (1910).

⁴⁹ Choisser v. York, 211 Ill. 66.

⁵⁰ Slenker v. Engel, 250 Ill. 499, 504 (1911).

⁵¹ Winn v. Blackman, 229 Ill. 198, 209 (1907).

⁵² Slenker v. Engel, 250 Ill. 506; Brents v. Smith, 250 Ill. 528.

⁵³ Brents v. Smith, 250 Ill. 527.

⁵⁴ Slenker v. Engel, 250 Ill. 508; Brents v. Smith, 250 Ill. 527.

⁵⁵ Brents v. Smith, 250 Ill. 527, 528.

⁵⁶ Slenker v. Engel, 250 Ill. 503.

⁵⁷ Brents v. Smith, 250 Ill. 530.

⁵⁸ Slenker v. Engel, 250 Ill. 504.

3353 Ballots, defective

A ballot which has been properly cast for the contestant should be counted for him, although the voter has failed to express his choice for any other candidates.⁵⁹

3354 Ballots, distinguishing marks

A distinguishing mark invalidates a ballot and is a mark which has been placed upon the ballot by the voter by which it can be identified. It is not a mark placed by the election officers, either before or after the ballot has been voted.⁶⁰

To reject a ballot on account of a distinguishing mark it must be such as will distinguish, identify and separate the ballot from other ballots cast at the election, and placed upon the ballot to indicate who cast it. The mark must not be such that it can be explained consistently with an honest purpose of the voter and which might have been made through mistake, inadvertence, or upon a change of mind as to the method by which he intended to mark his ballot. Whether a given mark on a ballot is or is not a distinguishing mark is largely, if not wholly, a question of fact which must be determined from an inspection of the original ballot itself. The ground upon which a ballot containing a distinguishing mark is rejected under Illinois law, is that it violates the letter and spirit of the law intended to guard the secrecy of the ballot.⁶¹

Numbers placed upon ballots followed by names of various candidates to aid their counting will not invalidate otherwise proper ballots.⁶² Figures placed on a ballot apparently to cumulate votes, or to indicate its distribution are not distinguishing marks.⁶³ A number of crosses placed upon the back of a ballot distinguishes and invalidates it.⁶⁴

3355 Ballots, erasures

Erasing crosses or names from one candidate and voting for another does not constitute a mutilation or a distinguishing of a ballot.⁶⁵ A cross which has been filled with lead pencil

⁵⁹ Arnold v. Keil, 252 Ill. 345.

⁶⁰ Slenker v. Engel, 250 Ill. 505, 506.

⁶¹ Winn v. Blackman, 229 Ill. 210, 213.

⁶² Brents v. Smith, 250 Ill. 527.

⁶³ Slenker v. Engel, 250 Ill. 509.

⁶⁴ Arnold v. Keil, 252 Ill. 344.

⁶⁵ Arnold v. Keil, 252 Ill. 345; Slenker v. Engel, 250 Ill. 505.

marks which appear to have been made by mistake or as an attempt to erase them does not invalidate the ballot.⁶⁶

A ballot should not be counted for a candidate whose name has been erased, although the ballot has been voted as a straight party ballot.⁶⁷

3356 Ballots; form, high school

No official ballot submitting the question of the establishment of a high school is required to be provided by the election officers. The ballot for this purpose, however, must be in a form that it would enable each voter to indicate with reasonable certainty his sentiment upon the proposition.⁶⁸

3357 Ballots; illegal, apportionment

In the absence of evidence showing for whom illegal ballots were cast, they should be apportioned between the candidates in proportion that the vote cast for each bears to the whole vote cast in the precinct.⁶⁹

3358 Ballots, initialing

The judge of election who hands the ballot must himself endorse his initials on it; and unless so endorsed, the ballot is void.⁷⁰ A judge's initials must be written and not stamped on the ballot. It is the voter's duty to see that his ballot is properly endorsed.⁷¹ The placing of a part of judge of election's initials upon a ballot does not invalidate it.⁷² Ballots which have no initials of an election judge should not be counted.⁷³

3359 Ballots, intention

A voter must make an honest effort to observe the law and to express his intention in accordance with its requirements.⁷⁴

3360 Ballots, mutilated

A voter should be given a proper ballot, and if no such ballot is given to him he should ask for it; and if he attempts to vote by a mutilated ballot, it should be rejected.⁷⁵

⁶⁶ Brents v. Smith, 250 Ill. 532.

⁶⁷ Brents v. Smith, 250 Ill. 528.

⁶⁸ People v. Sullivan, 247 Ill. 180, 182.

⁶⁹ Choisser v. York, 211 Ill. 60, 66.

⁷⁰ Choisser v. York, 211 Ill. 68; Winn v. Blackman, 229 Ill. 208.

⁷¹ Berryman v. Megginson, 229 Ill. 238 (1907).

⁷² Slenker v. Engel, 250 Ill. 510.

⁷³ Brents v. Smith, 250 Ill. 533; Slenker v. Engel, 250 Ill. 511.

⁷⁴ Slenker v. Engel, 250 Ill. 504.

⁷⁵ Brents v. Smith, 250 Ill. 529, 530.

3361 Ballots, party-circle

The marking of two or more party tickets in the circle nullifies the ballot in so far as both tickets bear the names of the candidates for the same office.⁷⁶

3362 Ballots, spoiled

A ballot which has been spoiled by the printer but which has been properly voted should be counted.⁷⁷

3363 Ballots, torn

Ballots which appear to have been torn by the voter cannot be counted.⁷⁸

3364 Ballots, writing in names

The writing of a candidate's name in a ballot which already contains his name in print is not a distinguishing mark.⁷⁹ A voter may write upon the ticket the name of the person for whom he desires to vote, although this may cause the name of the party voted for to appear twice upon the ticket.⁸⁰

3365 Fraud

Election frauds may be shown by circumstantial evidence.⁸¹

COMMISSIONERS' REPORT

3366 Form

To the honorable, judge of the court of said county.

The commissioners heretofore appointed by this court for the purpose of counting the ballots in the above entitled cause, do hereby report the following summary of all votes counted, including all ballots upon which the court has ruled:

Summary of votes

| Ward: | 1 | 2 | 3 | Total |
|---------------|-----------|---|---|-------|
| A B | 100 votes | | | |
| (candidate) | | | | |
| C D | 125 votes | | | |

Ballot exhibit No. not having been found in the sack of counted ballots in the ward, the court ruled that

⁷⁶ Winn v. Blackman, 229 Ill. 218.

⁷⁷ Slenker v. Engel, 250 Ill. 507.

⁷⁸ Brents v. Smith, 250 Ill. 533.

⁷⁹ Arnold v. Keil, 252 Ill. 344.

⁸⁰ Winn v. Blackman, 229 Ill. 216.

⁸¹ Brents v. Smith, 250 Ill. 534.

this ballot should not be counted, for the reason that it contained a distinguishing mark.

Respectfully submitted, this day of, 19..

Commissioners {
 {
 {

JUDGMENT OR DECREE

3367 Costs, tellers

It is not permissible to tax as costs for services of tellers upon a re-count of the ballots.⁸²

3368 Decree

(Caption)

This cause coming on to be heard upon the petition herein, the answer and the amended answer thereto, and the replication to said answer and amended answer, and the proofs and evidence offered on behalf of the respective parties in open court; and thereupon, upon consideration of the pleadings, evidence and count of the ballots cast at said election set forth in said petition and answers, and produced, opened, and counted in open court, and the arguments of counsel for the respective parties; and the court being fully advised in the premises, doth find as follows:

1, That the court has jurisdiction of the parties hereto and the subject matter thereof, and that the material allegations of the said petition are true, and that the petitioner is entitled to the relief prayed in said petition.

2, That on the day of, 19..., there was an election held in the city of, in the county of and state of Illinois, pursuant to law, for the election of city officers of said city of, in the county and state aforesaid, and that among the offices to be filled by the electors at said election was the office of mayor.

3, That at said election there were candidates voted for by the electors of said city, for the said office of mayor, viz., the petitioner; the defendant, and; and that upon the election returns of said election as made and returned by the judges of election of the several election precincts in said city and the canvass thereof by the city council of said city, the said defendant was declared by said city council elected to the said office of mayor of said city, and that each of said candidates was

⁸² Graham v. Peters, 248 Ill. 56.

a duly qualified and eligible candidate for the said office of mayor of said city.

4, That the said election returns as made and returned by the said judges of election in the said several precincts of said city as aforesaid, were incorrect and untrue; that the count of the votes cast at said election by the electors of said city for the petitioner, and the votes of said electors cast for the defendant as made and returned by said judges of election, was incorrect and untrue; that the number of the votes so returned by the said judges of election and canvassed by the said city council of said city aforesaid as having been cast by the electors of said city for the defendant for the office of mayor was not the true and correct number of votes cast at said election by said electors for said defendant; that the said number of votes so returned and canvassed as cast by said electors for the petitioner,, for the office of mayor was not the true and correct number of votes cast at said election for said petitioner; and that the finding and declaration of the said city council of the said city of upon said returns of said election as so made and returned as aforesaid, was as erroneous, untrue and void.

5, That the total number of votes cast by the electors of said city of, at said city election on the said day of, 19., for all of the said candidates for mayor was votes, of which said total number of votes so cast votes were cast for the petitioner, and votes were cast for the defendant and votes were cast for said; that of the said votes so cast for the said petitioner,, one of said votes was cast by, whom the court finds was not a legal voter in the precinct in which he, the said, voted, and that the said vote cast by the said should be deducted from the said votes cast for the said petitioner; that the total number of legal votes cast for the petitioner, at said election was votes, and the total number of legal votes cast for the said defendant at said election was votes; that the petitioner,, received a higher number of the legal votes cast at said election for the office of mayor than the defendant; that the petitioner received the highest number of legal votes cast at said election by the legal voters of said city of for any of the said candidates for the said office of mayor of said city, and received a plurality of all of the legal votes cast at said election for the said office of mayor over and above the legal votes cast for the defendant and over and above each, every and any of the other of said candidates voted for for said office of mayor at said election; and that the petitioner was duly and legally elected to the office of

mayor of the said city of at the said election held in said city on the day of, 19.., as aforesaid.

It is therefore ordered, adjudged and decreed, and the judgment of the court is that the said petitioner,, be, and he is hereby, declared duly and legally elected to the office of mayor of the city of, in the county of, and state of Illinois, for the term beginning on the day of, 19.., pursuant to law in such case made and provided.

And thereupon the said defendant who had before the rendering of the foregoing decree objected to the rendering thereof and objected separately to each of the findings therein respectively, here now duly excepts to the rendering of said decree and excepts separately to the making by the court of each of the findings therein.

And the said defendant prays an appeal from the foregoing judgment and decree of this court to the supreme court of Illinois, and the same is hereby allowed to him on condition that within days from this day he file an appeal bond herein in the penal sum of dollars, with surety to be approved by this court. And he is hereby granted days from this day in which to present, settle and have signed and sealed, and file his certificate of evidence herein.

And thereupon said defendant presents to the court here his said appeal bond in said penal sum with surety, and the same is hereby approved by this court and filed in open court.

Enter.

3369 Appeal or error

An appeal and not a writ of error is the appropriate mode whereby the supreme court may review the record of an election contest.⁸³ In a primary election contest, the judgment of the county court is final and is not appealable or reviewable upon writ of error.⁸⁴

3370 Bond

⁸⁵ The condition of the above obligation is such that whereas the said did, on the day of, 19.., at a term of the court then being holden within and for the county of, in the judicial circuit, in the state of Illinois, obtain a decree against the above bounden, declaring that the said was legally

⁸³ *Devous v. Gallatin County*, 244 Ill. 44.

⁸⁴ *Cataldo v. Ostiuso*, 253 Ill. 139; Sec. 62, Primary Election law 1910.

⁸⁵ Precede this by usual obligation.

elected to and entitled to hold the office of mayor of said city of, Illinois, and costs of suit, from which the said has prayed for and obtained an appeal to the supreme court of the state of Illinois;

Now, if the said shall duly prosecute said appeal, and shall, moreover, pay the amount of the said decree, judgment, costs, interest and damages, rendered and to be rendered against him the said in case the said decree, etc., shall be affirmed in the said supreme court, then the above obligation to be null and void; otherwise to remain in full force and virtue.

(Signatures and seals)

LOCAL OPTION

3371 Petition, requisites generally

A Michigan petition for a vote of the people on the question of prohibition of the manufacture and sale of intoxicating liquors is sufficient if it shows the proportionate and required number of legal signers from a comparison of the number of names on the petition with the number on the transcripts of the whole lists or canvass of the votes for the last general election filed with the petition, and it is verified by the statutory affidavits as to the genuineness of the signatures and the qualification of the signers, and as to the posting.⁸⁶

Neither the county clerk nor the board of supervisors has power to hear extrinsic evidence and pass upon the genuineness of the signatures, the qualification of the voters and the sufficiency of the posting of notice.⁸⁷

Under Michigan Local Option law the board of supervisors' determination upon the sufficiency of the petitions praying for the submission of the question of prohibition of the liquor traffic is final.⁸⁸

3372 Petition, requisites, mixed question

In Illinois, territory which is governed partly by the City Election law and partly by other election laws, the petition for local option should be addressed to the town clerk and the board of election commissioners, it should be executed in dupli-

⁸⁶ Kern v. Supervisors, 160 Mich. 11, 13, *et seq.*, (1910).

⁸⁷ Rutledge v. Supervisors, 160 Mich. 22, 25 (1910).

⁸⁸ Friesner v. Charlotte (City), 91 Mich. 504, 508 (1892); Sec. 6, Act 207, Laws 1889; Werstein v. Calhoun County, 156 Mich. 63, 65 (1909).

cate; and it should be verified so as to show that the signers residing in the territory wherein the City Election law is in force are registered legal voters, and those residing in the territory where that law is not in force, are legal voters. One petition should then be filed with the town clerk and the other with the board of election commissioners sixty days before the day upon which the election is to be held at which the proposition is to be submitted.⁸⁹

3373 Petition; verification requisites

In all cities in Illinois wherein the City Election law is in force, the affidavit verifying the petition must state that the petitioners are registered legal voters.⁹⁰

In a Michigan affidavit required to be filed where the poll lists are not attached to a petition for prohibition of the liquor traffic, the statement that the persons whose names are attached to the petition are, to the best of affiant's knowledge and belief, qualified electors in the particular township, ward, or election district, implies a residence within the township; and it is not necessary to state that the affiant knows that the petitioners reside within such township.⁹¹

3374 Petition, withdrawal of signers

In Michigan a voluntary and *bona fide* signer of a petition for a vote on the question of local option has no power to withdraw his name after the petition has been filed.⁹² Nor can such a signer withdraw his name from the petition between the time of posting of a copy of the petition and the filing of the original with the county clerk.⁹³

3375 Notice; affidavit of posting, requisites

An affidavit of posting which is to accompany the filing of the original petition with the county clerk must state that an exact copy of the petition had been posted at least ten days prior to such filing.⁹⁴

⁸⁹ People v. Wanek, 241 Ill. 529, 535 (1909).

⁹⁰ People v. Wanek, 241 Ill. 532.

⁹¹ Friesner v. Charlotte (City), 91 Mich. 506; Sec. 4, Act 207, Laws 1889.

⁹² Kern v. Supervisors, 160 Mich. 15.

⁹³ Rutledge v. Supervisors, 160 Mich. 26.

⁹⁴ Crawford v. Supervisors, 160 Mich. 31, 35 (1910).

3376 Election, voter's qualification

A person who is otherwise qualified to vote is not disqualified by failure to register.⁹⁵

3377 Election; result, clerk's finding

The finding of the county clerk upon the result of an election on local option is neither a conclusive nor a jurisdictional prerequisite to the action of the board of supervisors.⁹⁶

3378 Election; declaration, time

The provision of the Michigan Local Option statute requiring the tabulation of the votes cast and a declaration of the result is directory and does not require the board of supervisors to accomplish the work on the first Monday after the election as provided by statute.⁹⁷

3379 Election; resolution, requisites

The omission by the board of supervisors to designate the name of a newspaper for the publication of the resolution declaring the result of an election held under the Local Option law is not fatal, if the following day, a new resolution is passed which remedies the defect.⁹⁸

3380 Election; resolution, recording

The proceedings of the board of supervisors concerning the adoption or the rejection of prohibition may be entered of record upon the journal and signed at any time before final adjournment.⁹⁹ The recording by the county clerk of the affidavit of publication and the resolution declaring the result of the election, etc., upon the record of the board of supervisors is not jurisdictional, and the failure to make such a record within the time and place required by statute does not invalidate an election held under the Local Option law.¹⁰⁰

3381 Election, appeal

In Michigan, the decision of the board of supervisors in canvassing and determining the vote upon the question of local

⁹⁵ Rutledge v. Supervisors, 160 Mich. 26; Werstein v. Calhoun County, 156 Mich. 65.

⁹⁶ Madill v. Midland, 156 Mich. 56, 59 (1909).

⁹⁷ Madill v. Midland, 156 Mich. 61.
⁹⁸ Madill v. Midland, *supra*.

⁹⁹ Madill v. Midland, 156 Mich. 59.

¹⁰⁰ Madill v. Midland, 156 Mich. 62.

option is final and conclusive, and their action is not reviewable in the absence of anything impinging the regularity of their proceedings, or the accuracy of their canvass.¹⁰¹

So in contests of elections under Illinois Local Option law of 1907, the jurisdiction of the county court is final and no appeal lies from its judgment.¹⁰²

¹⁰¹ *Haehnle Brewing Co. v. Jackson County*, 156 Mich. 493, 499 (1909); *Madill v. Midland*, 156 Mich. 59.

¹⁰² *Saylor v. Duel*, 236 Ill. 429, 432 (1908).

CHAPTER LVIII

FORCIBLE DETAINER

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CAUSE OF ACTION

3382 Peaceable but unlawful entry

Unlawful entry and detainer is maintainable against a person who enters unlawfully, although peaceably.¹

3383 Notice, five days'

A landlord cannot forfeit the lease until the expiration of the time stated in a five days' notice, notwithstanding a provision in the lease that it might be forfeited at the election of the lessor for non-payment of rent without notice.²

¹ Harman v. Alt, 69 W. Va. 287 (1911).

² Hopkins v. Levandowski, 250 Ill. 372, 375, 376 (1911).

NOTICE

3384 Demand of possession (Ill.)

To

I hereby demand immediate possession of the following described premises: (Insert legal description), said premises being situated in the county of, in the state of Illinois.

Dated, etc.

.....

Owner.

(Venue)

I have duly served the within notice upon the within named by handing to each a true copy thereof this day of, 19.., at o'clock M.

....., Sheriff

By, Deputy.

3385 Notice to quit (Mich.)

To

Please take notice that you are hereby required to quit, surrender and deliver up possession to me of the premises herein-after described, which you now hold of me, as my tenant, on or before the day of, 19.., for the reason that I intend to terminate your tenancy and to repossess the whole of such premises on the day above mentioned, said premises being described as follows, to wit, the store number avenue, in the city of, county of, and state of Michigan.

This notice is given in accordance with a provision contained in a certain lease of said premises made and executed by one to the said and

Dated, etc.

JURISDICTION

3386 Personalty

Summary proceedings cannot be brought under Michigan statute to recover possession of property after it has been separated from real estate and it has become personalty.³

PRAECIPE

3387 Virginia

To the clerk of the county of

Please summon the defendant to answer the complaint of

³ Cunningham v. Kinyon, 156 Mich. 428, 431 (1909); (11,164), C. L. 1897.

the plaintiff that the defendant is in possession and unlawfully holds from the plaintiff the premises described as follows, to wit, (Give full legal description).

Summon defendant to term of this court.
..... P. q.

SUMMONS

3388 Florida

State of Florida,

To all and singular the sheriff of said state, greeting:

We command you to summon, if he be found within said state, personally to be and appear before the circuit court of the judicial circuit in and for county, on the day of, 19.., being the first day of our next term, to answer in an action wherein ..he pray.. restitution of the possession of the following real estate with appurtenances; (Set forth legal description) with a certain building being built upon the same, containing by estimate feet of land, with appurtenances, lying and being in the state aforesaid. And have you then and there this writ.

Witness clerk of the said court, this day of, 19..

(Seal) Clerk..... court, county, Florida.

Return

Received this writ, and executed the same by delivering a true copy thereof to the within named defendant, at the same time exhibiting this original and informing the said of the contents thereof.

.....
Sheriff county.

By D. S.

Copy, service and return \$......

b

Came to hand this day of, 19.., and executed same by leaving with and serving a true copy thereof on a male member of the family over and above fifteen years of age living and residing with within named at his usual place of residence in county, Florida, for, and at the time of the service reading to him this original writ this day of, 19..

3389 Illinois

We command you to summon, if they shall be found in your county, personally to be and appear before the court of said county, on the (first) day of the next term thereof to be holden at the court house in, in said county, on the day of, 19.., then and there in our said court to answer unto, in an action of forcible entry and detainer. And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness, etc.

3390 Michigan, return day

In a proceeding for the recovery of the possession of land the summons may be made returnable in three days, but not more than six days exclusive of the day of the issuance of the summons and the day of its return.⁴

3391 Michigan, form

State of Michigan, }
County of }ss.

To the sheriff or any constable of said county, greeting:

In the name of the people of the state of Michigan, you are hereby commanded to summon company, a Michigan corporation, if it shall be found in your county, to appear before me,, circuit court commissioner, in room No., county building, corner and streets, in the city of, in said county of, on the day of, 19.., at o'clock, city time, sharp, in the forenoon, to answer unto the complaint of and, filed pursuant to the provisions of chapter three hundred and eight of the Compiled Laws of the state of Michigan of 1897. And have you then and there this precept.

Given under my hand and seal this day of, 19..

.....
Circuit court commissioner, county, Michigan.

3392 Michigan, service

The service of a summons in a proceeding to recover possession of land must be made at least two days before the return day exclusive of the return.⁵

⁴ Sallee v. Ireland, 9 Mich. 154, 156 (1861); (11,166), C. L. 1897.

⁵ Salley v. Ireland, 9 Mich. 157; (11,167), C. L. 1897.

3393 Virginia

Commonwealth of Virginia, to the sergeant of the city of , greeting:

We command that you summon and , partners, etc., to appear before the court of the city of , on the day of term, 19.. , that being day of , 19.. , to answer the complaint of , that the said and the said , partners, etc., are in possession of and unlawfully withhold from the said , who is legally entitled to the possession thereof, the following described premises, to wit, (Describe property).

And have then and there this writ.

Witness the clerk of our said court, at his office this day of , 19.. , in the year of our foundation.

..... , Clerk,
By , D. C.

Test:

Return

Executed in the city of , this day of , 19.. , by serving copies hereof on and , partners, trading as

.....
Sergeant, city of ,
By , Deputy.

3394 West Virginia

State of West Virginia, to the sheriff of county, greeting:

You are hereby commanded to summon to appear before the judge of our circuit court of county on the day of , 19.. , (the said court then being in regular session at the court house of said county) to answer the complaint of , that the said is in the possession of and unlawfully withholds from the said a certain parcel of land lying in the valley in said county of , which parcel of land is supposed to contain about acres, and is bounded as follows: beginning (Describe property), and which strip of land is now in controversy between the said and

And you are further commanded to have at the court house on the day of , 19.. , this writ and how you have executed the same.

Witness, clerk of said circuit court, at the court house of said county, this day of, 19.., and in the year of the state.

....., Clerk.⁶

Return

Executed the within process on the within named
....., on the day of, by delivering an
office copy thereof to, the wife of the said
....., at his usual place of abode, and giving her
information of its purport; he, the said, not
being found.

..... S. T. C.,
By, Deputy.

DECLARATION OR COMPLAINT

3395 Florida

(Caption)

....., of county, Florida, com-
plains that unlawfully and against his consent
withholds from the possession of certain real
estate known and described as follows: (Set forth legal de-
scription) with a certain building being built
upon the same, containing by estimate land,
with the appurtenances, lying and being in said state afore-
said; wherefore he prays restitution of possession and his
damages.

.....,
..... Plaintiff.
.....
Plaintiff's attorney.

Sworn and subscribed, etc.

3396 Illinois

(Caption)

..... complains to the circuit court of the county
of, in the state of Illinois, and states that she
is entitled to the possession of the following described prem-
ises, situate, lying and being in said county of,
to wit: (Insert legal description); and that
unlawfully withholds possession of said premises from her,
the said

.....,
By
her attorneys.

⁶ In this state the summons is also
a declaration. Sec. 3332, Ann. Code
1906.

b

(Caption)

..... and, heirs at law of
, deceased, by their attorneys complain to (the municipal) court of that they, the said
,, are entitled to the possession of the following described premises in said county, to wit: the floor of the building, No. North street, in the said city of, and the district aforesaid, and that unlawfully withholds the possession thereof from the said and

Wherefore, they pray a summons, in pursuance of the statute in such case made and provided.

Dated, etc.

.....,
 Heirs at law of
 deceased,
 By
 their attorneys.

3397 Michigan

(Venue)

To, circuit court commissioner of county, Michigan.

The complaint of, of said county of
, respectfully shows that, a Michigan corporation, is in possession of the following described lands and tenements, situated in the city of, said county and state, to wit, stores known as number avenue, together with the basement thereunder, said premises being situated in the block at the corner of and streets.

⁷ The complainant is the landlord of said premises, and is her agent, who makes this complaint for and in her behalf.

That said defendant is the tenant under said complainant.

That defendant withholds said premises unlawfully and against the right of said complainant and that said complainant is entitled to the possession of the same.

Wherefore, this complainant prays that proceedings according to the statute in such cases made and provided may be taken against said defendant, and that the possession of said premises may be restored to said complainant.

.....

⁷ In a personal complaint by the owner, instead of this paragraph state: "That the complainant is the

landlord of the said premises and makes this complaint for and in his own behalf."

(Venue)

On this day of, 19.., personally appeared before me the said, and on oath says that he has heard read the foregoing complaint by him subscribed and knows the contents thereof, and that the same is true.

3398 Virginia

....., the plaintiff in this suit, complains of the defendant in this suit, of a plea of trespass on the case.

For this, to wit, that whereas, the plaintiff, at the time of the committing the grievance hereinafter complained of and for a long time prior thereto, was and had been, and ever since has been, the owner of one undivided one-sixth in fee simple and lessees of the remaining five-sixths of that certain lot or parcel of land lying and being in the of to wit: that lot or parcel commencing (Give legal description of the land); and whereas, prior to and at the time of the committing of the said grievance, the plaintiff derived great benefit and profit from the letting for hire to the owners and masters of boats, vessels, sailing-crafts and steamers the privilege of landing freight and passengers and receiving the same at, upon and from that portion of said lot or parcel of land adjoining the said county dock; and whereas, that portion of said county dock, at the time of the committing of the grievance hereinafter complained of and prior thereto had been and was a portion of river; and whereas, then and prior thereto, the plaintiff and others, the citizens of this commonwealth, and the public generally had a right to use the said portion of said river for all purposes of navigation; and whereas, the plaintiff and the said citizens and the public prior to the committing of said grievance, had used and are using the same for said purpose without let, hindrance, or interruption; nevertheless, the said defendant well knowing the premises and contriving specially to injure and harass the plaintiff, and to deprive him of his valuable right of property aforesaid, on the day of, 19.., at the city of, aforesaid with force and arms, and without lawful right and authority so to do, did drive, put down and fasten large numbers of posts, stakes and piles in, onto and upon the said portion of said county dock which is adjacent to the aforesaid lot of the plaintiff, so close to the said lot as to prevent the access thereto of said vessels, boats, sailing-craft and steamers, and did thereby deprive the plaintiff of the privilege of letting out to hire and rent the said lot or parcel for the aforesaid uses of said vessels, sailing-craft, boats and steamers.

And other wrongs to the plaintiff then and there did, to the

damage of the plaintiff of dollars; and therefore, he brings his suit.

..... p. q.

DEFENSES AND PLEAS

3399 Abatement, nonjoinder of parties, plea (Va.)

(Caption)

Subject to its objection to the process of publication in this cause as contained in its plea number, and subject to its objection to the process served upon and the return thereon, as contained in its plea number, and without in any manner waiving the same, this defendant for further plea comes and says that if it shall be determined that the process of publication aforesaid is sufficient in law and that the same constitutes due process of law, or if it shall be determined that the process served upon and the return thereon is sufficient in law, then this defendant comes and prays judgment of the plaintiff's declaration and of the writs and the returns thereon because it says that the said wrongs and grievances mentioned in the plaintiff's declaration, if any such wrongs and grievances were ever committed by the said defendant, were committed jointly with the county of, one of the counties of the commonwealth of Virginia, which said county is still in existence. And this defendant says that the county dock in the plaintiff's declaration mentioned is the property of the said county of, and that the said county holds the same subject to the use of the, which are the joint and equal property of the said county of and this defendant, and that the piles mentioned in the plaintiff's declaration as having been wrongfully driven, if any such ever were wrongfully driven as alleged, were driven jointly by this defendant and the said county of All of which this defendant is ready to verify.

Wherefore, and inasmuch as the said county of is not named in the said declaration nor in said writ, together with this defendant, the said defendant prays judgment of the said declaration and of the said writ and the returns thereon, and that the same may be quashed.

.....
Defendant.

By
its counsel.

I,, of counsel for the defendant, make oath that the allegations in the above plea are true to the best of my knowledge and belief.

Sworn, etc.

.....

3400 General issue (Ill.)

(Caption)

And the defendants,, by, their attorney, come and defend the wrong and injury, when, etc., and say that they are not guilty of unlawfully withholding the possession of the premises described in the complaint filed herein, from the plaintiff,, in manner and form as said plaintiff has thereof complained against them; and of this they put themselves upon the country, etc.

(Michigan)

(Caption)

And the said, defendant in this suit, comes and defends the wrong and injury claimed by said plaintiff to have been committed by defendant, and says that he is not guilty of the said grievances above laid to his charge in manner and form as the said plaintiff has above thereof complained against him.

And he, the said defendant, puts himself upon the country.

3401 Title

In a summary proceeding for possession, the title to the property is not triable; and when such question is properly raised by the pleadings and the evidence, the proceeding should be dismissed.⁸

3402 Title, notice of (Mich.)

To the above named plaintiff.

Sir:

Please take notice that the defendant will show on the trial of this cause in his defense under the plea above pleaded, the following, viz.:

That he is now and has been for years and more last past the absolute owner in fee of the premises in question.

That he has held the undisputed possession of said premises in question for years and more before this proceeding was begun.

.....
Defendant.

VERDICT

3403 Florida

We, the jury, find that the defendant did not at the time of the filing of the complaint in this cause unlawfully hold pos-

⁸ Parker v. Case, 155 Mich. 497, 501.

session of the real estate mentioned in the complaint of the plaintiff; that the said defendant has not so held possession thereof against the consent of the plaintiff within years next before the filing of the said complaint; and that the plaintiff has not the right of possession in the real estate aforesaid.

....., Foreman.

3404 West Virginia

The court having directed us to so find, we, the jury, therefore find that the defendant unlawfully detains from the plaintiff the land in controversy, to wit: (Insert legal description).

....., Foreman.

JUDGMENT

3405 Illinois

(Caption)

On this day come the said parties hereto, said plaintiff by, her attorneys, and said defendants *pro se*, and this cause coming on to be heard before the court, a trial by jury having heretofore been waived herein, the court listens to the testimony submitted by the respective parties hereto and also to the arguments of counsel, and after fully considering the same, finds the defendants guilty of withholding from the plaintiff the possession of the premises described in the plaintiff's complaint herein.

It is therefore considered and adjudged by the court that the plaintiff do have restitution from the defendants of the following described premises situated in the city of, in the county of, and the state of Illinois, to wit: (Insert legal description), and that a writ of restitution issue therefor and that the plaintiff do have and recover of and from the defendants her costs and charges in this behalf incurred. (Add exception and prayer for appeal, etc., if any taken)

3406 Michigan

(Caption)

The jury by whom the issue in this cause was tried having found by their verdict that the said defendants are guilty of unlawfully withholding from said plaintiff the premises described in this cause, viz.: number avenue, in the city of, county of and state of Michigan, and having assessed the damages of the said plaintiff by reason thereof over and above his costs and charges by him about his suit in this behalf expended at the sum of dollars;

Therefore, it is adjudged that the said plaintiff do recover against the said defendants the possession of said premises according to the verdict of the jury aforesaid, and that he have a writ of restitution thereof according to the force, form and effect of his said recovery.

And it is further adjudged that the said plaintiff do recover against the said defendant his damages by the jurors in form aforesaid assessed, together with his costs and charges aforesaid to be taxed; and that the said plaintiff have execution therefor.

Dated, etc.

.....,
Circuit Judge.

3407 Virginia

(Caption)

This day came the parties by their attorneys, and thereupon the defendants and plead not guilty, and the plaintiffs reply generally to said plea, and the parties having waived a trial of the issue by a jury, the whole matter of law and fact was heard and determined by the court; whereupon, it is considered by the court that the said plaintiffs, in accordance with a written opinion of the court this day filed, do recover from the defendant and the possession of that portion or parcel of land (Describe the same), and that the plaintiffs recover of the said defendants their costs in this behalf expended.

3408 West Virginia

(Caption)

This day came again the parties by their attorneys, also came again the jurors herein, pursuant to their adjournment of yesterday, who having fully heard the evidence and the instructions of the court, they by the direction of the court found the following verdict: (Insert verdict).

Thereupon, the defendant moved the court to set aside the verdict of the jury aforesaid, as being contrary to the law and the evidence, which motion being considered by the court, the same was overruled; to which action and ruling of the court in overruling said motion the defendant excepted; and on his motion he is granted days in which to prepare and have signed a proper bill, or bills of exception.

It is therefore considered by the court that the plaintiff,, do recover of, the possession of the land as described by the said verdict and the summons in this case; and also his costs herein expended.

And on the further motion of the defendant,, he is granted a stay of the execution of this judgment till the

.... day of, 19.., to enable him to apply to the supreme court of appeals of this state for a writ of error herein, but such stay shall not be effective until defendant, or someone for him, shall execute a good and sufficient bond, conditioned according to law, in the penalty of dollars, to be approved by the clerk of this court.

APPEAL

3409 Illinois, jurisdiction

Under Illinois practice the immediate right of possession alone, and not the title is involved in forcible detainer. The judgment, therefore, is not reviewable in the supreme court unless the amount or value involved exceeds the sum of one thousand dollars and this appears on the record, or by the certificate from the appellate court. The amount involved is determined, as a general rule, by the rental value of the premises, and not by their saleable value.⁹

Actions of forcible detainer involving less than one thousand dollars, cannot be appealed, in Illinois, to the supreme court without a certificate of importance.¹⁰

3410 Illinois, appeal bond

¹¹ The condition of the above obligation is such, that whereas the above did on the day of, 19.., at a term of the (circuit) court then being holden within and for the county of, and state of Illinois, obtain a judgment against the above bounden in an action for forcible entry and detainer of certain premises in said county, and for restitution thereof and for costs of suit, from which judgment the said have prayed for and obtained an appeal to the appellate court in and for the district of the state of Illinois;¹²

⁹ *McDole v. Shepardson*, 156 Ill. 383, 384 (1895); Sec. 8, c. 37, *Hurd's Stat.* 1909, p. 666.

¹⁰ *McDole v. Shepardson*, *supra*; *Thomas v. Olenick*, 237 Ill. 167, 168 (1908).

¹¹ Precede this by usual obligation.

¹² Upon appeal to the supreme court, the obligation of the bond should be the same as in an appeal to the appellate court. So should the condition of the bond, except that the word "have" before the word "prayed" should be omit-

ted, and after "Illinois," the following should be inserted: "And that whereas, the said appellate court has affirmed the said judgment of the said ——— court; and that also whereas the said ——— have prayed for and obtained an appeal to the supreme court of the state of Illinois from the judgment of the said appellate court;" proceed with the condition, beginning with "Now," to the word "said," inserting the phrase "supreme court" in place of "appellate court."

Now, if the said shall prosecute their appeal with effect, and pay all rent now due for said premises, and that may become due therefor before the final determination of said suit, and all damages and loss which the plaintiff may sustain by reason of the withholding of the possession of said premises, and by reason of any injury done thereto during such withholding together with all costs until the restitution of the possession thereof to the plaintiff, in case the judgment from which the appeal is taken be affirmed in the said (appellate court), then the above obligation to be void; otherwise to remain in full force.

(Signatures and seals)

3411 West Virginia, jurisdiction

The judgment of a circuit court in an action for unlawful detainer is reviewable in the supreme court, for the action of unlawful detainer, in West Virginia, involves the title and the boundary of land.¹³

¹³ Rathbone Oil Tract. Co. v. Rauch, 5 W. Va. 79, 81 (1871); Sec. 1, c. 135, Code 1899.

CHAPTER LIX

GARNISHMENT

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IN GENERAL

3412 Proceeding, nature

Garnishment is purely statutory and is a proceeding at law.¹

PERSONS GARNISHABLE

3413 Executors and administrators

Executors and administrators are subject to garnishment only after the entry of an order of distribution.²

A garnishment suit cannot be commenced against an executor before the probate of the will and the issuing of letters testamentary.³

3414 Foreign corporations

A foreign corporation having property and agents in Illinois is subject to attachment and garnishment upon a transitory debt due a nonresident.⁴

3415 Municipalities

The salary and wages of a municipal employee is not subject to attachment and garnishment in Illinois; the Garnishment act of 1905 is unconstitutional.⁵

A municipal corporation is subject to garnishment under Michigan laws upon the salary or other indebtedness of an officer or employee of such corporation.⁶

¹ Siegel, Cooper & Co. v. Schneck, 167 Ill. 522, 524, 526 (1897).

² O'Connell v. McClenathan, 248 Ill. 350, 354 (1911); Laws 1897, p. 231, unconstitutional.

³ Wheeler v. Chicago Title & Trust Co., 217 Ill. 128, 133 (1905).

⁴ Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 598, 599 (1897); Han-

nibal & St. Joseph R. Co. v. Crane, 102 Ill. 249 (1882); Finch & Co. v. Zenith Furnace Co., 245 Ill. 586, 592 (1910).

⁵ Badenoch v. Chicago, 222 Ill. 71 (1906).

⁶ Dunkley v. Marquette, 157 Mich. 339, 342 (1909).

3416 Sheriffs, surplus under execution sale

The surplus money remaining in the sheriff's hands after levy and sale of property under an execution is subject to garnishment.⁷

PROPERTY SUBJECT

3417 Joint indebtedness

A party who is indebted to one person cannot be garnisheed for an indebtedness due that person and another.⁸ So, a debt due to one judgment debtor cannot be garnisheed upon a judgment against him and another.⁹

3418 Shares of capital stock

A corporation is not subject to garnishment and attachment upon shares issued by it to a stockholder.¹⁰

3419 Exemption

Nonresidents are not entitled to exemption in garnishment proceedings.¹¹

PARTIES

3420 Plaintiffs, joinder

In garnishment, the judgment debtor stands in the position of plaintiff with reference to the garnishee and comes within the rule that the joinder of too few or too many plaintiffs will defeat a recovery.¹²

3421 Defendants, designation

It is permissible, in an attachment and garnishment, to designate individuals by their reputed names or surnames and joint defendants by their separate or partnership names, or by such names, styles or titles as they are usually known.¹³

⁷ Commerce Vault Co. v. Barrett, 222 Ill. 169, 179 (1906).

⁸ Siegel, Cooper & Co. v. Schueck, 167 Ill. 525.

⁹ Chicago & Northwestern Ry. Co. v. Scott, 174 Ill. 413, 415 (1898).

¹⁰ Pease v. Chicago Crayon Co., 235 Ill. 391, 394 (1908).

¹¹ Stevens v. Brown, 20 W. Va. 450, 462 (1882).

¹² Siegel, Cooper & Co. v. Schueck, *supra*.

¹³ United States Express Co. v. Bedbury, 34 Ill. 459, 466 (1864); Sec. 3, c. 11, Hurd's Stat. 1909, p. 192; Secs. 1, 62, Hurd's Stat. 1909, p. 1212.

JURISDICTION

3422 Test

The residence of the creditor or garnishee, and not the *situs* of the debt, determines the jurisdiction of the court in garnishment proceedings.¹⁴

AFFIDAVIT

3423 Florida, before judgment

In circuit court, state of Florida.

| | | |
|------------|-----------------|------------------------|
| | } Civil action. |Judicial circuit, |
| Plaintiff, | | |
| v. | | |
| | | |
| Defendant, | } | county. |
| | | |
| Garnishee. | | |

Before me, the undersigned authority, personally appeared, who being first duly sworn says that his name is; that he is agent therefor and duly authorized to act herein; and that he believes that the defendant will not have in his possession after execution shall be issued, visible property in this state and said county upon which a levy can be made sufficient to satisfy a judgment for the sum of dollars, which amount he believes the said plaintiff will recover in said suit. Affiant therefore prays that a writ of garnishment may issue against, who, affiant has reason to believe, has in his hands, possession or control goods, moneys, chattels or effects belonging to said defendant, and that said moneys in the hands of said are now due to said defendant for

Subscribed, etc.

3424 Florida, on judgment

(Caption)

Before me, the clerk of the circuit court in and for said county, personally came, who being duly sworn say.. that on the day of, 19.., ..he.. obtained a judgment against for the sum of dollars and cents in the court in and for

¹⁴ Becker v. Illinois Central R. Co., 250 Ill. 40, 44 (1911).

..... county, Florida; and that there still remains due and unpaid on said judgment the sum of dollars, and deponent.. expect.. to recover said last stated sum in this suit of garnishment and believe.. that the said defendant.. in said judgment ha.. not in possession visible property upon which a levy can be made sufficient to satisfy the said judgment. Affiant.. therefore pray.. that a writ of garnishment may issue against, who, plaintiff.. ha.. reason to believe, ha.. in..... hands, possession or control goods, moneys, chattels or effects belonging to defendant..

Sworn, etc.

3425 Illinois, on judgment

(Caption)

....., being first duly sworn, deposes and says that on, 19.., or thereabouts, E and K, as executors of the estate of H, deceased, recovered a judgment against said B for the sum of dollars and costs of said suit; that shortly thereafter a writ of execution issued out of the office of the clerk of said court of county, upon said judgment against said B and was delivered to the sheriff of county,, to execute; that on, 19.., the sheriff of county made a demand upon said writ of execution that the said B turn out property real or personal for the satisfaction of said judgment; that said B refused to turn out property in compliance to said demand; and that said sheriff of county,, has on the day of, 19.., made a return upon said writ of "No property found."

Affiant further saith that said defendant B has no property within the knowledge of this affiant, in his possession, liable to execution; and that this affiant has just reason to believe that the D, a corporation, and the C, executor of the last will and testament of W, deceased, are, or one of them is, indebted to the said B or have, or one of them has, in his or its possession, custody or charge, effects or estate of said defendant B.

And further affiant saith not.

Subscribed, etc.

3426 Maryland, praecipe

(Caption)

Mr. Clerk:

Issue an attachment on the above judgment and lay the same in the hands of

.....
Plaintiff's attorney.

3427 Michigan, before judgment

State of Michigan.

In the circuit court for the county of

| | |
|--------------|---|
| | } |
| Plaintiff.., | |
| v. | |
| | } |
| Defendant.. | |

| | |
|--------------------|-------|
| State of Michigan, | } ss. |
| County of | |

..... of, being duly sworn, deposes and says that he is (the agent, attorney or one of the attorneys) of the plaintiff.. in the above entitled cause, commenced by the said plaintiff.., being the above named against, being the said defendant.., in the said circuit court for the county of; that (this deponent makes this affidavit as agent, attorney or as one of the attorneys for and on behalf of said plaintiff); that the said cause is a personal action arising upon (express or implied) contract; and that the said defendant justly indebted to the said plaintiff upon such contract in the sum of dollars over and above all legal set-offs, which said sum is now due and unpaid, and which this deponent believes (he, or the said plaintiff, is) entitled to recover in the said action against the said defendant..

And this deponent further says that he has good reason to believe, and does believe, that of ha.. property, money, goods, chattels, credits, and effects in hands, and under custody and control, belonging to the said the above named defendant.. and that the said indebted to the said the above named defendant.., and that such indebtedness is now due.

And this deponent further says, that he is justly apprehensive of the loss of the said sum of dollars, so due to the said plaintiff.. from the said defendant.. unless a writ of garnishment issue to the said

And further this deponent says not.

Subscribed, etc.

.....

3428 Michigan, on judgment

(Caption)

..... of, being duly sworn, deposes and says, that he is (the agent, attorney or one of the attorneys of) the plaintiff.. in the above entitled cause (and makes this

affidavit for and in behalf of the plaintiff); that on the day of, in the year hundred, a was rendered in the above entitled cause by the said circuit court for the county of in favor of the above named, being the said plaintiff., and against the above named, being the said defendant., for the sum of dollars, damages, and dollars, costs of suit, and that said is now in force, and that the said defendant justly indebted to the said plaintiff.. upon said in the sum of dollars, over and above all legal set-offs. (Add last three paragraphs of previous affidavit)

3429 Mississippi (suggestion for writ), before judgment

State of Mississippi, }
 county. } ss.

..... }
 v. } No.

To the clerk of the circuit court district county, Mississippi:

As plaintiff in attachment against the estate, real and personal, of, I suggest that of are indebted to the defendant, or have property of the defendant in their hands, or know of some other person who is so indebted or who have effects or property of defendant in their hands; therefore, I suggest the issuance of a writ of garnishment against the above named parties.

Dated this, etc.

.....
 Plaintiff.

3430 Mississippi (suggestion for writ), on judgment

To the clerk of the circuit court of county:

The undersigned in the above styled case in the court of the county of in said state, respectfully show that on the day of, 19.., at the term, 19.., of said court of county, a final was rendered in said case in favor of said against the said defendant.. in said suit, for the sum of dollars (\$.....) with interest thereon at the rate of per centum per annum from, 19.., until paid, and all costs of said suit; which said final has been duly enrolled on the judgment roll of said county, as provided by law; that said final remains due and unpaid and has never been assigned by said to anyone; and the under-

signed, as aforesaid, hereby suggest.. that of
 county, Mississippi, indebted to the said
 defendant.. in said case, or ha.. property of the said defend-
 ant.. in hands, or know of some other person.. who
 so indebted, or who ha.. effects or property of the
 said defendant.. in hands.

You are therefore hereby requested to issue writ..
 of garnishment as by law directed.

Witness signature.., this the day of
, 19..

| | | | | | |
|----------|----------------------------|--|-------------|--|-----------------------------|
| No. | Circuit Court District. | v.; Suggestion for Writ of Garnishment on final the court of county. | Filed, etc. | Writ of garnishment is- sued to of county, Miss., this day of, 19.. at o'clock ... M. | Clerk. By D. C. |
|----------|----------------------------|--|-------------|--|-----------------------------|

WRIT

3431 Florida

State of Florida,

To all and singular the sheriffs of the state of Florida, greeting:

Whereas, has this day made oath before me, in
 a suit pending in the circuit court of the judicial
 circuit of Florida, in and for the county of, wherein
 is plaintiff and is defendant, that his
 name is, that he is agent therefor and
 duly authorized to act therein, that he believes that defendant
 will not have in his possession after execution
 shall be issued visible property in this state and said county
 upon which a levy can be made sufficient to satisfy a judgment
 for the sum of dollars and cents, which
 amount he believes the said plaintiff will recover in said suit;
 and affiant suggesting that has in his hands, pos-
 session or control goods, moneys and chattels or effects belong-
 ing to said defendant, and states that the moneys in the hands
 of are now due to said defendant for

This, therefore, is to command you to summon said
 to be and appear before the judge of our said court,
 at the court house in, Florida, on the day

of, 19.., next, in the above mentioned suit, and state on oath in writing, to be filed in said court, whether he is at the time of the answer indebted to said defendant, or was indebted at the time of the service of this writ, or at any time between such periods, and in what sum or sums, and what goods, moneys, chattels or effects of defendant, at the time of his answer shall be in his hands, possession or control, or had at the time of the service upon him of this writ, or at any time between such periods; and whether he knows of any person or corporation who is indebted to said defendant, or who may have any of the effects of said defendant in his hands.

Witness, etc.

Return

Received the within writ this day of, 19.., and executed the same this day of, 19.., by delivering a true copy thereof to president of the within named, and at the same time exhibiting this original county, Florida.

....., Sheriff.
By, D. S.

3432 Illinois, nature

A garnishee summons is process.¹⁵

3433 Illinois, form

State of Illinois, }
County of } ss.

The people of the state of Illinois, to the sheriff of said county, greeting:

We command that you summon if ..he.. shall be found in your county, personally to be and appear before the court of county, on the day of the next term thereof, to be holden at the court house in, in said county, on the Monday of next, then and there to answer unto as to the rights, credits, choses in action, effects, estate, property or moneys, in hands, or in the hands of either of them, belonging to the said

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness,, clerk of our said court, and the seal thereof, at, aforesaid, this day of, 19..

....., Clerk.

¹⁵ Hannibal & St. Joseph R. Co.
v. Crane, 102 Ill. 256.

3434 Michigan, before judgment

State of Michigan, }
 County of } ss.

The circuit court for the county of

In the name of the people of the state of Michigan, to the sheriff of the county of, greeting:

Whereas, as plaintiff.. ha.. commenced a personal action, arising upon (express or implied) contract, in the circuit court for the county of against as defendant.. by (declaration, summons, *capias* or attachment) and said plaintiff.. ha.. filed in the office of the clerk of said court, the affidavit of (plaintiff.. or the attorney of) said plaintiff.., stating in said affidavit, among other things, that the said defendant.. justly indebted to the said plaintiff.. upon such contract, in the sum of dollars, over and above all legal set-offs, that said sum is now due and unpaid, that the said (plaintiff.. or affiant) has good reason to believe, and does believe, that ha.. property, money, goods, chattels, credits, and effects, in ..h.. hands and under ..h.. custody and control, belonging to the said defendant.., that the said indebted to the said defendant.., that such indebtedness is now due and that the said (plaintiff.. or affiant) is justly apprehensive of the loss of the said sum of dollars, so due to the said plaintiff.. from the said defendant.., unless a writ of garnishment issue to the said

Now, therefore, you are hereby commanded to warn and summon the said to appear before said court, at the court house in the of, on the day of, 19.., to make disclosure in writing, under oath, to be filed with the clerk of said court, touching the liability of said as garnishee.. of the said principal defendant.. in said action as charged in the said affidavit, and that said from the time of due service upon of this writ shall thenceforth pay no money and deliver no property or effects to the said, the principal defendant.. in said action until discharged.

And of this writ you shall make due return.

Witness the honorable circuit judge at this day of, 19..

....., Clerk.

.....
 Plaintiff's attorney.

Return

(Venue)

I hereby certify and return, that on the day of, 19.., in said county, I served the within writ upon

..... the garnishee therein named, by showing the said writ, with the seal impressed thereon, to said above named garnishee., and at the same time delivering to said above named garnishee.. a true copy of said writ.

Dated, etc.

.....
Sheriff of said county.

Fees:

Service of writ.....

Mileage

Copies

3435 Michigan, on judgment

(Caption)

In the name of the people of the state of Michigan, to the sheriff of said county of, greeting:

Whereas, lately, to wit, on the day of, 19.., judgment was rendered in, in favor of said and against said, for the sum of dollars; and

Whereas, said ha.. filed in the office of the clerk of said court the affidavit of, said stating in said affidavit, among other things, that he has good reason to believe, and does believe, that h.. property, money, goods, chattels, credits and effects, in ..h.. hands and under ..h.. custody and control, belonging to the said, and that the said indebted to the said whether such indebtedness is now due or not; that said justly indebted to the said upon such judgment, in the sum of dollars, over and above all legal set-offs, that said sum is now due and unpaid, and that the said is justly apprehensive of the loss of the same unless a writ of garnishment issue to the aforesaid

Now, therefore, etc. (as in preceding form)

3436 Mississippi, on judgment

State of Mississippi, }
..... county. } ss.

To any lawful officer of county:

Whereas recovered a judgment in court of county, on the day of, 19.., for the sum of dollars and cost, against and the judgment has not been satisfied, and said having made the proper suggestion for a writ of garnishment against

We therefore command you to summon said to

appear in said court at on the day of 19.., then and there to answer, under oath in writing:

First, Whether you or either of you be indebted to the defendant or was so indebted at the time of the service of the writ on you or either of you, or have at any time since been so indebted; and if so indebted at what sum, whether due or not, and when due or to become due and how the debt is evidenced and what interest it bears.

Second, What effects of the defendant you have or had at any time of the service of the writ on you or have had since, in your possession or under your control.

Third, Whether you know or believe any other person is indebted to the defendant or either of them; and if so who, and what amount and where he resides.

Fourth, Whether you know or believe that any other person has effects of the defendant or either of them in his possession or under his control and if so, who and where he resides.

Herein fail not, under the penalty of having judgment against you for the whole amount.

Witness my signature this day of 19..

3437 Virginia, on judgment

The commonwealth of Virginia, to the sheriff of county, greeting:

Whereas, and, partners, trading as have filed a suggestion that there is a liability on for the amount of the judgment obtained in the court of county, against for dollars and cents, with interest thereon at per cent per annum from the day of 19.., until paid, and costs, upon an instrument waiving the homestead, by reason of the writ of *feri facias* which has been sued out of the said court and delivered to, sheriff of said county.

Therefore, we command you that you summon the said to appear before the court of county, at the court house of the said county on the day of term next, to do and receive what our said court shall in that part consider; and have then and there this summons.

Witness, etc.

Return

Executed this day of 19.., by delivering a copy hereof to and, in person.

....., Sheriff.
 By Deputy.

NOTICE

3438 Requisites

In a publication notice, it is not necessary to state the names of the garnishees.¹⁶ Neither is it necessary that such notice shall state to what counties the writs of attachment have issued; nor must it give any description of the property that has been attached.¹⁷

INTERROGATORIES

3439 Necessity

The filing of interrogatories and the rendering of a conditional judgment against a garnishee after a *scire facias* had been issued are essential pre-requisites to the rendition of final judgment against him.¹⁸

3440 Form (D. C.)

Notice

To, garnishee:

You are required to answer the following interrogatories, under oath, within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

.....
Attorney for plaintiff.

Interrogatories

1. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to the defendant..? If so, how and in what amount?

Answer:

2. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant.. in your possession or charge? If so, what?

Answer:

Subscribed, etc.

¹⁶ Pine Tree Lumber Co. v. Central Stock & Grain Exchange, 238 Ill. 449, 454 (1909).

¹⁷ Morris v. School Trustees, 15

Ill. 266, 270 (1853); Lawver v. Langhans, 85 Ill. 138, 140 (1877).

¹⁸ Williams v. Vanmetre, 19 Ill. 293, 294 (1857).

| | | | |
|-------|-------|----------------------------------|-----------|
| | | Interrogatories for Garnishee | |
| | v. | | Attorney. |

(Illinois)

(Caption)

Interrogatories to the garnishee summoned in this case:

1. Had you or either of you in your possession, charge or control, at the date of the service of the writ in this cause, any moneys, rights, credits or effects owned by or due to? If so, state what rights, amounts thereof, by whom due and when payable?

2. Were you indebted to said at the date of the service of said writ of garnishment? If so, how much, for what due and when payable?

3. State what effects or debts of the said there were at the date of the said writ of garnishment, in the hands of any other person or persons besides yourselves, to the best of your knowledge and belief?

4. Had you, or either of you, in your possession, charge or custody at the date of the service of said writ, any lands, tenements, goods or chattels of said? If so, state the description of each piece or parcel of land and its value?

5. Had you, or either of you, at the date of service of said writ, any rights, credits or effects of said (not hereinbefore specified) in your possession, charge or custody, from you or either of you due and owing at the service of said writ, or any time since, or which may hereafter become due? If so, state the value, amount, when due and how payable.

6. Had you, or either of you, any property, goods, chattels, rights, credits or effects of any kind belonging to the said or in which he is interested? If so, describe the same fully and particularly, giving the items and amounts?

7. What contract, if any, has been entered into by you or either of you jointly or severally, with the said for the sale or purchase of real estate?

8. If in the answer to interrogatory seven you state that there is a contract as above stated, then set forth the contract

3444 Process not served, plea (Ill.)

(Caption)

And the said by, its attorney, comes and appears for the purpose of filing this plea to the writ of attachment issued in the above cause, and for no other purpose whatever, and defends, etc., and says that the said writ of attachment, purporting to be a garnishee process against said, was never served on the said; and he further says that the return on the back of said writ of attachment of said pretended service purporting to be made on said, on the day of, is wholly untrue and false; and this the said is ready to verify; wherefore, it prays judgment of the said writ, and the return thereon, and that the same may be quashed, etc.

.....

By

its attorney.

(Verification)

3445 Suit prematurely brought, practice

A garnishee must set up in his answer the premature bringing of the suit.²²

ANSWERS AND REPLICATIONS

3446 Florida

(Caption)

Comes now, and for answer to the writ of garnishment heretofore served upon said garnishee in above stated cause, answering says that he,, is truly indebted to, the defendant in the above stated cause, in the sum of dollars; that he was so indebted at the time of the service of said writ of garnishment and is at the time of filing of this answer indebted in manner, form and amount as above set forth. Further answering said writ the said garnishee says that he knows of no other person to be indebted to said defendant, or to have any money or effects of said defendant in his hands. Further answering said garnishee hereby claims the statutory allowance as a compensation for this answer.

.....

Attorney for garnishee.

(Verification)

²² Wheeler v. Chicago Title & Trust Co., 217 Ill. 136.

3447 Illinois, suit prematurely brought

(Caption)

The answer of C, sued by the name "....., executor of the last will and testament of W, deceased," to the interrogatories propounded to it as garnishee in this behalf by A for the use of E and K, executors of the estate of H, deceased.

This garnishee for answer unto the interrogatories propounded, to wit, as aforesaid states that on or about the day of, 19.., said W died testate in the county of, and state of; that in and by her last will and testament there was bequeathed to said A, the surviving husband of said W, a pecuniary legacy of \$......; that it was provided in said will that if the estate left by the deceased should not be sufficient to fully satisfy all of the legacies in said will mentioned, after the payment of all debts and funeral expenses, then said legacy should abate pro rata:

That on the day of, 19...., this garnishee was served with garnishee summons in this cause; that on the same day C filed in the probate court of county, a petition wherein said C prayed that letters testamentary of said last will and testament be issued to it; that thereafter, on the day of, 19.., the last will and testament of said W, deceased, was offered for probate and was duly proved and admitted to probate on said date; that thereafter, and on the day of, 19...., letters testamentary, profert of which is hereby made, were issued to C, whereby said C was appointed by said probate court of county executor of said last will and testament of W, deceased; that prior to the issuance of said letters, and on, 19.., said A assigned, set over and quitclaimed to C, all his right, title and interest in and to the estate of W, deceased, either as legatee under her will, or as heir to her estate, for the purpose of securing the payment of a loan of \$...... and interest thereon at the rate of per cent per annum, until paid; that a copy of said assignment has been filed for record in the probate court of county and has been spread on the records of said probate court of county,

Further answering, this garnishee states that on the day of, 19.., said A assigned, set over and quitclaimed unto B all his right, title and interest in and to the estate of W, deceased, either as legatee under her will or as heir to her estate under the laws of descent of the state of; that said assignment to B was duly filed for record in the probate of county, on the day of, 19.., and was again filed for record in the probate court of county

on the day of, 19.., and was duly spread of record.

Further answering, this garnishee states that it was not, at the time of the service of said writ, nor at any time since has it been, indebted to said A; that neither at the date of the service of said writ nor at any time since has it had in its possession, charge or control any moneys, choses in action, credits or effects owned by or due to said A; that it had not at the time of the service of said writ, or at any time since, charge or custody of any lands, tenements, goods or chattels of said A; that it had not at the date of the service of said writ, or at any time since, any rights, credits or effects of said A in its possession, charge or custody from it due and owing, or which may hereafter become due; that at the time of the service of said writ it had not, nor has it had at any time since, any property, goods, chattels, rights, credits or effects of any kind, belonging to said A or in which A is interested; that except as above herein stated this garnishee has not since become liable, directly or indirectly, immediately or contingently, to said A for any legacy to said B by the will of said W, deceased.

Further answering, this garnishee states that at the date of the service of the writ herein this garnishee was not executor of the last will and testament of said W, deceased, and prays the same advantage of this answer as if this garnishee had pleaded *ne unques executor* in abatement of the writ and affidavit in this cause, and prays that said writ and affidavit may be quashed as to this garnishee for the reason that neither at the date of the service of said writ nor at the date of the return thereof was it executor of the last will and testament of W, deceased.

.....
Garnishee,
By
its attorney.

(Venue)

....., being first duly sworn, says that he is agent for said C, sued by the name "....., executor of the last will and testament of W, deceased," in this behalf, and that the foregoing answer to the interrogatories propounded to it in this cause is true in substance and in fact.

.....
Subscribed, etc.

3448 Illinois, non indebitatus

(Caption)

The answer of the C, a corporation, in its individual capacity only, to the interrogatories propounded to it as garnishee in this behalf by the said A, plaintiff.

1. To the first interrogatory said C answering says that at the time of the service upon it of the writ issued in this cause it was not, nor is it now, indebted to the said A.

2. To the second interrogatory the said C answering says that at the date of the service of the writ upon it in this cause it did not have, nor has it now, any moneys, choses in action, credits or effects owned by or due to the said A, except as follows: On the day of, 19.., this garnishee, C, loaned to the said A the sum of \$....., and for the purpose of securing said indebtedness of the said A to this garnishee, C, said A executed and delivered to this garnishee an instrument in writing, assigning to this defendant, as security for said indebtedness, all his right, title and interest in and to the estate of W, deceased, both as heir and legatee, which said instrument was in words and figures as follows, to wit: (Insert copy of assignment).

3. To the third interrogatory the said C answering says that it had not in its possession, charge or custody, at the date of the service of the said writ on it, nor has it now, any lands, tenements, goods or chattels of the said A.

4. To the fourth interrogatory this garnishee states that at the date of the service of said writ on it, it had not any rights, credits or effects of said A (not herein specified) in its possession, charge or custody, from it due or owing, at the time of the service of said writ on it, or at any time since, and that it has in its possession, charge or custody no rights, credits or effects of said A which may hereafter become due.

5. To the fifth interrogatory this garnishee states that it has no property, goods, chattels, rights, credits or effects of any kind, except as above specified, belonging to said A or in which said A is interested.

(Venue)

....., being first duly sworn, on oath says that he is the agent of C in this behalf; that he has personal knowledge of all the facts involved in said answers and knows that the foregoing answers, by it made, are true in substance and in fact.

Subscribed, etc.

.....

REPLICATION

(Caption)

Now comes the said A, who sues for the use, etc., and says that the said C, a corporation, answering in its individual capacity, hath not truly discovered the lands, tenements, goods, chattels, moneys, choses in action, credits and effects of the said A, and of the value thereof in its possession, custody or

charge, or from it due and owing at the time of the service of the writ herein, or at any time after, or which shall thereafter become due to the said A. And this he prays may be inquired of pursuant to the statutes in such cases made and provided.

.....
Attorney for plaintiff.

3449 Maryland, non assumpsit

(Caption)

And the said, garnishee in this action, by, h.. attorney, come and defend the wrong and injury when, etc., and on behalf of the said, the defendant named in the said attachment, say.. that the said defendant.. did not undertake or promise in manner or form as the said, plaintiff in this action, ha.. above thereof complained against h..; and of this h.. put, the said defendant.., upon the country, etc.

Replication

And the said, plaintiff.. in this action, as to the plea of the said, garnishee.. in this action, by ..h.. pleaded on behalf of the said, the defendant.. named in the said attachment, and whereof the said garnishee.. h.. put the said defendant.. upon the country, the said plaintiff.. doth the like.

3450 Maryland, nulla bona

(Caption)

And for further plea in h.. own behalf, the said garnishee.. by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say.. that the said plaintiff.. condemnation of the said sum of money in the attachment aforesaid and the return thereof specified, in the hands of h.. the said garnishee.. as of the goods, chattels and credits of the said defendant.. ought not to have, because h.. say, that the said garnishee at the time of laying the said attachment in h.. hands had not, nor at any time since ha.. had, nor now ha.. any of the goods, chattels or credits of the said defendant in h.. hands—and this ready to verify; wherefore h.. pray.. judgment whether the said plaintiff condemnation of the said sum of money, in the attachment aforesaid and return thereof specified, as of the goods, chattels and credits of the said defendant.. in the hands of h.., the said garnishee to have ought, etc.

.....

To, attorney for the plaintiff in the above action:

You will please take notice that a rule hath been entered in the office of the clerk of the court of requiring you to reply to the above pleas, within fifteen days after the service of copy thereof and notice of said rule.

| | | | | |
|---|----|---|--|-----------------------------------|
| Docket Page No. In the court. | v. | Clerk: File the within pleas and notice and rule to reply., Attorney. | Service admitted this day of, 19.., Attorney. | Filed day of, 19.. |
|---|----|---|--|-----------------------------------|

Replication

(Caption)

And the said plaintiff.. as to the plea of the said garnishee.. by ..h.. in ..h.. own behalf above pleaded say.. that the said plaintiff.. by reason of any thing by the said garnishee.. in that plea alleged, from having condemnation of the said sum of money in the attachment aforesaid, and return thereof specified, as of the goods, chattels and credits of the said defendant.., in the hands of the said garnishee.., ought not to be precluded, because ..h.. say.. that the said garnishee.. on the day of laying the said attachment in ..h.. hands, had to the value of the sum of dollars in the writ of attachment aforesaid specified of the goods, chattels and credits of the said defendant.. in ..h.. hands, to wit, at the city aforesaid; and this ..h.. pray.. may be enquired of by the country.

To, attorney for the garnishee.. in the above action:

You will please take notice that a rule will be entered, at the office of the clerk of the court of requiring you to rejoin to the above replication within fifteen days after the service of a copy thereof, and notice of said rule.

.....
Plaintiff's attorney.

3451 Michigan

(Caption)

....., being duly sworn, deposes and says that he is the garnishee named in the writ of garnishment issued in said cause on the day of, 19..., and for answer and disclosure thereto, deponent says that this deponent heretofore, to wit, on the day of, 19.. (State the facts showing possession of property, or lack of possession of the same and if property is disclosed, add) all of which said certain stock of goods are exempt under the laws of this state, and that the provisions of act number 223 of the Public Acts of the state of Michigan for the year 1905, do not apply to the sale, transfer, and assignment of such exempted goods (State any other facts concerning the property of defendant).

This deponent further states that he is informed and believes, and has good reason to believe, that the said had a large number of creditors on, to wit, the day of, 19..., and that such debts are still owing by said, and that if any of said property did come into the possession of this deponent contrary to the provisions of the act number 223 of the Public Acts of the state of Michigan for the year of 1905, then in such case each and all of said creditors are equally interested in such property and are entitled to their just and proportionate share thereof.

1, Except as above stated, this deponent at the time of the service of said writ of garnishment upon him had no property, money, goods, chattels, credits or effects in his hands or under his custody or control belonging to said defendant.

2, Except as above stated, this deponent at the time of such service was not indebted to the said defendant.

Subscribed, etc.

.....
Attorney for garnishee defendant.

.....
Business address.

3452 Mississippi, answer.

(Caption)

This day personally appeared before me the undersigned officer, by its president, summoned as garnishee in the case of, against, who on oath answering says that said company is not indebted to the defendant, nor was it so indebted at the time of the service of this writ, nor has it at any time since been so indebted; that said company has not now, nor did it have at any time since the service of this writ, nor at any time of

the service of this writ any effects of the defendant in its possession or under its control; that it is not known to the officer of the said nor has he any belief that any other person is indebted to defendant; that he neither knows nor believes that any other person has any effects of the defendant in his possession or under his control.

And having fully answered as required by law the said prays to be discharged with reasonable costs.

Subscribed, etc.

3453 Mississippi; replication, necessity

An answer which expressly disclaims all indebtedness, but which apparently admits liability in part, must be contested and no reliance should be placed upon the supposed admission which is at variance with the express denial.²³

3454 Mississippi; replication, form

Comes plaintiff,, and contests the answer of the defendant garnishee,, filed in this cause, and for cause of said contest states that he believes the said answer to be incorrect in the following particulars, to wit:

1, Plaintiff is informed and believes that the said had at the time of the service of said writ of garnishment, and now has in its possession certain shares of stock and other personal property belonging to and owned by the said

2, Plaintiff is informed and believes that the said garnishee, knew at the time of the service of said writ of garnishment, and now knows of other persons who had in their possession certain shares of stock and other personal property belonging to and owned by the said

All of which plaintiff is ready to verify.

.....
Plaintiff's attorney.

INTERPLEADING

3455 Interplea (Ill.)

(Caption)

And now comes, a corporation organized and existing under and by virtue of the laws of the state of, by, its attorney., and interpleads according to the form of the statute in such case made

²³ Hattiesburg Trust & Banking Co. v. Hood, 97 Miss. 340 (1910).

and provided, and says that the moneys, debts or funds, garnisheed in this cause in the possession of were at the time the said was garnisheed in this cause and now are the moneys and funds of it, the said, and not of the said And this the said is ready to verify.

Wherefore, it prays judgment if its said funds and property ought to be detained by virtue of said writ, etc.

.....
its attorney.

(Venue)

..... being duly sworn deposes and says that he is the, of, who interpleaded in the above entitled cause; that he has read the above interplea of the said and that the matters therein stated are true.

Subscribed, etc.

.....

3456 Answer (Ill.)

(Caption)

And now comes, the plaintiff in this suit, and for answer to the interplea of, a corporations, etc., denies that the moneys, debts or funds, garnisheed in this cause in the possession of the said, were at the time the said was garnisheed in this cause, or are now, or were at any other time, the moneys or funds of the said; but on the contrary, this plaintiff avers that said moneys and funds so garnisheed were at the time of the service of this writ in this cause, moneys and funds due and owing to the said by and from the said And this the plaintiff prays may be inquired of by the country.

.....
By
its attorney.

JUDGMENT

3457 Discharge, practice

A garnishee is entitled to a discharge under Mississippi practice, upon an answer disclaiming liability, to which there is no contest at the term when the answer is filed.²⁴

²⁴ Hattiesburg Trust & Banking Co. v. Hood, *supra*; Secs. 90, 2353, Code 1906.

3458 Requisites, costs

A judgment against a garnishee must be in favor of the attachment or judgment debtor for the benefit of the attachment or judgment creditor for the full amount due from the garnishee.²⁵ The judgment should not require the payment of costs out of the garnishee's own means, unless he has resorted to unnecessary and protracted litigation.²⁶

3459 Conditional

(Caption)

And it further appearing that personal service of process issued herein has been had on the garnishee, and said garnishee being called comes not, nor any person for it, but herein makes default, which, on motion of plaintiff's attorney, is hereby entered herein; wherefore, a conditional judgment ought to be entered against said garnishee. Therefore, it is considered by the court that defendant, for the use of plaintiff, recover from said garnishee dollars, being the amount of the original judgment rendered herein, together with all plaintiff's costs and charges in this behalf expended, unless said garnishee, after being served with a *scire facias* to be issued, shall show cause why above conditional judgment should not be made final and execution issued accordingly.

3460 Final

(Caption)

This cause coming on to be heard upon the motion of the garnishee and for a new trial in said cause, after argument of counsel and due deliberation by the court, said motion is overruled and a new trial denied; thereupon, the garnishees submit herein their motion in arrest of judgment, which, after argument of counsel and due deliberation by the court said motion is also overruled and denied.

Therefore, it is considered by the court that the defendant for the use of the plaintiff and such other attaching creditors as are entitled by law to pro rate, do have and recover of and from the said garnishee and, the said sum of dollars and cents together with its costs and charges in this behalf expended, and have execution therefor.

Thereupon, the said garnishees having entered their excep-

²⁵ Siegel, Cooper & Co. v. Schueck,
167 Ill. 526.

²⁶ Hannibal & St. Joseph R. Co.
v. Crane, 102 Ill. 260.

tions herein pray an appeal from the judgment of this court to court; which is allowed, upon filing their appeal bond herein in the sum of dollars to be approved by the court within days from this date, and leave is given said garnishees to file a bill of exceptions herein within days from this date.

3461 Preliminary judgment against executor

(Caption)

This cause being called for trial, came the plaintiff by his attorney and the defendants by their attorneys, and the issues being joined and a jury being waived by all parties, and the cause being submitted to the court upon the affidavit and interrogatories filed by the plaintiff and upon the answers thereto filed by C and by C executor of the last will and testament of W, deceased, garnishees, and the plaintiff's replication thereto, and upon evidence heard in open court, the court, after hearing all the evidence adduced, finds the issues for the defendant, C, in its individual capacity, and for the plaintiff as against the C, as executor of the last will and testament of W, deceased.

And the court finds that E and K as executors of the estate of H, recovered a judgment in the circuit court of county against A on, 19.., for the sum of dollars, and the costs of said suit, dollars; that said judgment with lawful interest now amounts to dollars; that a writ of *feri facias* was issued from said court upon said judgment, 19.., and was on the day of, 19.., prior to the beginning of this suit returned by the sheriff of county no property found and no part satisfied; that on or about, 19.., one W died, leaving a last will and testament dated, 19.., in and by which there was bequeathed to said A a pecuniary legacy of dollars; that C was appointed by said will to be the executor thereof, and on or about, 19.., said will was admitted to probate, and on or about, 19.., letters testamentary issued out of the probate court of county,, to said C as executor of said last will and testament of said W; that there has come into the possession, custody and control of said C, executor of the last will and testament of W, deceased, up to the time of its filing its answer in this suit, personal assets worth about dollars; that on or about, 19.., said A assigned his said legacy to the C as security for a loan to him of dollars, and that on or about, 19.., said A further assigned said legacy to B, but that neither of said assignments was reduced to writing and filed in the probate court of county till about, 19..; and that the garnishment

summons issued in this suit was served on said C as executor of the last will and testament of W on, 19..

And the court further finds that no order of distribution has been entered in the probate court of county in the matter of the estate of said W, deceased; and forasmuch as it is provided by statute that an executor may be garnisheed with respect to any money belonging to any legatee under any will, but that no final judgment shall be rendered against such executor until after an order of distribution has been made by the court out of which letters testamentary issued, it is hereby ordered that this cause stand continued so far as relates to C, executor of the last will and testament of W, deceased, to await the further order of this court after an order of distribution shall have been entered in the matter of said estate of W, deceased. It is further ordered that C in its individual capacity be hereby discharged as garnishee herein.

Enter

Judge.

FINAL JUDGMENT

(Caption)

It appears and the court finds that an order of distribution has been entered in the probate court of county,, in the estate of said W, deceased, in and whereby there was set apart and ordered distributed as a part of the legacy of said A, under the will of said W, deceased, the sum of dollars; that the judgment upon which this suit was begun is still wholly unpaid and unsatisfied; and that there is now due thereon \$.

Therefore, on motion of plaintiff's attorney, it is considered by the court that the said A, for the use of K, executrix of the estate of H, deceased, do have and recover of the C, executor of the last will and testament of W, deceased, the sum of, of which amount dollars shall be for the use of K as executor of the estate of H, deceased, to be paid in due course of administration.

Enter

Judge.

3462 *Scire facias*, return day

Under Illinois practice a judgment in garnishment may be rendered against partners who have been served, and those who have not been served may be made parties to the judgment by *scire facias* the same as any other joint defendants.²⁷ A *scire*

²⁷ *Sherburne v. Hyde*, 185 Ill. 586 (1900); Sec. 14, Practice act (Ill.); Sec. 26, Attachment act (Ill.).

facias against the garnishee must be made returnable to the next term of court; if it is made returnable to the second succeeding term the writ is void.²⁸

3463 *Scire facias*, writ (Ill.)

State of Illinois, }
County of } ss.

To people of the state of Illinois, to the sheriff of county, greeting:

Whereas, at the term of the circuit court of county, in the year nineteen hundred and, a judgment was rendered in and by said court against defendant.., in favor of plaintiff.., for the sum of dollars and cents; and having been duly summoned as garnishee.. of the said defendant.., and the having been solemnly called and failed to appear and discover on oath or affirmation what lands, tenements, goods, chattels, moneys, credits and effects of the said defendant.. were in custody, charge, or possession, or under control, or what moneys or property were by owing to said defendant.., as is required by law, a conditional judgment for the above-named amount was by said court rendered against said garnishee.., and this writ ordered to be issued.

Now, therefore, we command you that you summon the said, garnishee.. as aforesaid, personally to be and appear before the said circuit court of county, on the first day of the next term thereof, to be holden at the court house at, in said county, on the Monday of next, then and there to show cause, if any ..he.. have or can show, why final judgment should not be entered against upon due execution and return of this writ.

And have you then and there this writ, with an indorsement thereon, in what manner you shall have executed the same.

Witness, etc.

APPEAL

3464 Interpleader

A person who has been regularly made a party to a garnishment proceeding, who has interpleaded, and against whom a judgment has been rendered has an independent right of appeal.²⁹

²⁸ Schmitt v. Devine, 164 Ill. 537, 543 (1897); Sec. 8, Garnishment act (Hurd's Stat. 1909, p. 1213).

²⁹ O'Connell v. McCleaathan, 248 Ill. 353.

RELEASE

3465 Affidavit (Fla.)

(Caption)

Before me personally came the
defendant in the suit above named and on oath says that the
moneys garnisheed in the hands of are moneys due
him for his personal labor and services and that he is the head
of a family residing in this state.

Subscribed, etc.

CHAPTER LX

GUARDIANSHIP

APPLICATION

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teen years
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APPLICATION

3466 District of Columbia

United States of America, }
 District of Columbia. } ss.

In the Supreme Court of the District of Columbia,
 Holding a Probate Court.

To the honorable justices of the supreme court of the District
 of Columbia.

The petition of respectfully represents:

1, That she is a citizen of the United States of America and
 a resident of the District of Columbia, where she has resided
 for the last years.

2, That she is the widow of, who died intestate
 the day of, 19.., in the District of Columbia.

3, That as a result of the marriage of and
 his wife, they had the following issue, to wit:,
 born the day of, 19.., and, etc.

4, That left surviving him, the widow, your
 petitioner, and their said children and, a brother
 who resides in

5, That, late of the District of Columbia, died
 in said District on the day of, 19.., previous
 to and at the time of her death she was a member in good
 standing of one of the Fountains, styled House of King David
 number, of the Grand Fountain of United Order of
 True Reformers of Richmond, a benevolent organization with
 a branch office in the District of Columbia.

6, That before the death of she had transferred
 and assigned in her policy and on the books of the Fountain,
 her death benefit of dollars to the minor children of
 your petitioner namely and,
 with the understanding that after the payment of her
’s funeral expenses, the remainder should be paid
 to the said minors.

The premises considered, your petitioner prays that she,
 the mother of and, who are also
 the children of, deceased, and the same children
 mentioned and referred to by, deceased, as her
 beneficiaries, be appointed guardian of, her minor
 children of their person and estate; that letters of guardian-
 ship be issued to her as guardian for the said and
; and that she might have such other and further
 relief as the nature of the case might require and to the court
 may seem just and proper.

.....

.....
 Attorney for petitioner.

(Verification)

b

(Caption)

The petition of by his
and next friend, respectfully represents:

1, That he is a citizen of the United States of America and
a resident of the District of Columbia.

2, That he is a minor child of, deceased, who
departed this life on the day of, 19.., in the
city of, in the District of Columbia.

3, That the said is entitled to the following goods
and chattels and personal property in the District of Columbia,
to wit: one insurance policy on the life of the said decedent for
the sum of dollars, and to no other property known to
the petitioner.

4, That said minor child is above the age of fourteen years,
and elects his (uncle) as a fit and suitable person
to act as his guardian and requests that the said
be appointed as such.

Wherefore, your petitioner prays that this honorable court
may appoint and commission as guardian for the
said minor and fix the amount of the bond to be given by said

..... his
.....
mark

Witness:

.....

.....
Attorney for petitioner.

3467 Florida

(Caption)

In court of the county judge, state of Florida,
In the matter of the guardianship of }
..... } county.
Minor.. }

To the honorable, county judge of said
county:

The petition of sheweth that,
minor.., residing in the county of and state of
..... That said minor child
and heir.. of and ha.. an interest in some
property situate and being in the county of and
state of, by reason whereof it is necessary that
a guardian of said minor.. be appointed

Your petitioner.. therefore pray.. that may
be appointed and qualiled as such guardian.

.....
.....

3468 Illinois, minors under fourteen years

State of Illinois, }
 County of } ss.

In the county court of county.

To the honorable, judge of said court:

The petition of respectfully sheweth that late of county, died, leaving his children hereinafter named, and now living with; that the said minor.. ha.. no guardian; that the names and residences of their relations are as follows, to wit,; that the names and ages of said minor.. are as follows:, aged years on the day of, 19..,, aged years on the day of, 19..; that said minor.. ha.. real and personal property in this county, to wit, that the personal estate of said minor.. consist of, and the value of such personal estate does not exceed the sum of dollars; that said minors' real estate consists of; that the gross annual income of said minors' real estate does not exceed the sum of dollars; that the value of the improvements and timber on the real estate of said minor.. does not exceed the sum of dollars; that your petitioner, who resides at street is of said minor.., and therefore prays that may be appointed guardian of the person.. and estate.. of said minor.. until arrive at the age of fourteen years, and until another guardian shall be appointed.

.....
 (Verification on information and belief)

3469 Illinois, minors over fourteen years

State of Illinois, }
 County of } ss.

In the county court of county.

To the honorable, judge of said court:

The petition of respectfully sheweth that, late of county, died, leaving your petitioner h.... child, who now living with; that your petitioner.. ha.. no guardian, and that the names and residences of relatives are as follows.; that the names and ages of your petitioner.. as follows, to wit, years on the day of, 19.., years on the day of, 19..; that the personal estate of your petitioner.. consists of; and the value of such personal estate does not exceed the sum of dollars; that your petitioners' real estate consists of; and that the gross annual income of your petitioners' real estate does

not exceed the sum of dollars; that the value of the improvements and timber on the real estate of your petitioner.. does not exceed the sum of dollars; that your petitioner.. over the age of fourteen years, and hereby select as ..h.. guardian; that said is a suitable and proper person to be appointed such guardian, and had signified his acceptance, in writing, to act if appointed, would therefore pray that be appointed guardian of the person.. and estate.. of your petitioner..; and that all orders necessary may be made.

(Verification)

I,, the person named in the foregoing petition do hereby signify my willingness to act as such guardian, if appointed.

3470 Maryland

¹ In the orphans' court for.....county.

The application of to be appointed guardian for, 19..,, 19.., infant children of, deceased, late of county.

Your applicant respectfully shows that the interest of said minor.. consist of the following in personal and real property, viz.: (Give full description).

3471 Michigan

State of Michigan,

The probate court for the county of

To the probate court for said county:

In the matter of the estate of, minor..

I,, respectfully represent that I reside in the of in said county and am the of minor child who resident.. of said county and whose name.. and age.. are as follows:, born, 19..,, born, 19..; that said minor the child of, late of, deceased; that said minor possessed of estate within said county and that the estimated value thereof is as follows: real estate, \$. or thereabout; personal estate, \$. or thereabout, as I am informed and believe; that said minor..... no general guardian in this state, and that it is necessary a guardian be appointed for said minor

I therefore pray that be appointed guardian of said minor

P. O.

(Verification)

¹In some counties letters of guardianship are issued upon verbal application.

3472 Mississippi

Petition of in the matter of the estate of deceased, for letters of guardianship.

To the honorable, chancellor of the chancery court of the county of, in the state of Mississippi.

The petition of the undersigned respectfully represents that, late of said county, deceased, left surviving him minor children, to wit: a minor, aged years on the day of, 19.., a minor, aged years on the day of, 19..

That said minor..... resident.. of this county; that said minor.... entitled as heir.. at law of said, deceased, who diedtestate, to a estate, estimated at dollars, for heir's share, and your petitioner is advised that a legal guardian is necessary for the protection of the interests of said minor.. therein.

That your petitioner is the and natural guardian of said minor.., and as such, since the death of said decedent, has had the custody and tuition of said minor.., and now prays your honor that letters of guardianship may be granted to of the person and estate of said minor.., according to the statutes.

And your petitioner as in duty bound will ever pray.

Sworn and subscribed to before me, this day of, 19..

....., clerk.
.....D. C.

| | | | | |
|-----------------------------|-----------------|--------------------------------|---|-------------|
| Petition of | Estate of | In the Chancery Court of | Ordered that letters of guardianship be granted to petitioner on entering into bond in the sum of dollars with and as sureties. Term, 19.. | Chancellor. |
| for letters of guardianship | Deceased. | county. | | |
| | | Filed, etc. | | |

3473 Virginia, practice

A guardian may be appointed upon motion or oral application if the minor is above fourteen years of age: if the minor is under fourteen, the application must be in writing.

APPOINTMENT

3474 District of Columbia

(Caption)

Upon consideration of the petition of, praying to be appointed the guardian of the estate and person of her children, viz., born and born, and it appearing to the satisfaction of the court that the children will receive as beneficiaries under a certain policy formerly held by deceased, in the (Describe company or order) for the sum of dollars, less the funeral expenses and costs of this proceeding, it is this day of, 19.., ordered, adjudged, and decreed that be and she is hereby appointed guardian of the estate and person of her infant children hereinbefore named, provided she shall give a bond in the penal sum of dollars for the faithful performance of the duty enjoined upon her.

.....
Justice.

3475 Florida

(Caption)

On the application of, to be appointed guardian.. of the, of said minor.., and it appearing to the court that said applicant fit and proper person.. to receive said appointment, it is ordered, adjudged and decreed, that said, be and hereby appointed guardian.. of the of said minor.., and that upon taking the prescribed oath, and entering into bond to be approved by this court, in the sum of dollars, letters of guardianship, as aforesaid, be granted to said applicant..

Given under my hand and seal of said court, this day of, 19..

.....
County Judge.

3476 Maryland

(Caption)

On application of, the court appoints said applicant as guardian of, minor, child of deceased, and the said being here present in court, accepts of said appointment and offers secur-

ity as such guardian, which is approved by the court and bond ordered to be executed accordingly.

Bond, security.

.....

Judges.

3477 Michigan

(Caption)

On reading and filing the petition duly verified, of
, praying for the appointment of a guardian for said
 minor.., it appearing satisfactory to the said court that the
 said, under the age of twenty-one years,
 and above the age of fourteen years, that ..h.. reside..
 in said county of, and more than ten miles
 from the place of holding this court; it is ordered that the
 nomination of a guardian by the said be made
 before, and certified to, this court, by a justice of the peace of
 said county of, or the township clerk for the
 township where the said minor.. reside..

.....

Judge of Probate.

Nomination

State of Michigan, }
 County of { ss.

To the judge of probate for said county:

The minor.. named in the foregoing order do.. nominate
 of, to be
 guardian and request appointment accord-
 ingly.

.....

(Venue)

I,, a justice of the peace in and for
, do hereby certify that on this day of,
 19.., the above named, to me well known as
 the person described in the foregoing order, personally ap-
 peared before me and nominated to be
 guardian, and in my presence subscribed the foregoing instru-
 ment to that effect.

.....

Justice of the Peace.

3478 West Virginia

(Caption)

Upon the written application duly acknowledged according
 to law, of minors over the age of fourteen

years and children of, deceased, late of said county, is by the court duly appointed guardian of said, minors over the age of fourteen years, and of, infants under the age of fourteen years, children of, deceased, late of said county.

Thereupon, the said together with his surety entered into and acknowledged a bond in the penalty of \$. conditioned according to law and took the oath required by law.

BOND AND OATH

3479 Florida

Know all men by these presents, that we, principal, and suret., are held and firmly bound unto, governor of the state of Florida, and his successors in office, in the penal sum of dollars, lawful money of the United States of America, for the payment whereof well and truly to be made we bind ourselves, our and every of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this day of, 19..

Whereas, the above bounden,, has applied to the county judge of said county of, to be appointed guardian of, and whereas, the judge of said court having approved said application;

Now, the condition of the above obligation is such, that if the said, above bounden, shall, as guardian of said minor., faithfully preserve the estate of said minor., and shall annually, on or before the first day of June, and at all times when thereunto required during the continuance of said guardianship, render to and file in said court an inventory of said minor.. estate, its profits and disbursements, and all the rest and residue of the goods, chattels and credits which shall be found remaining upon the said guardian's account, the same being first examined and allowed by said court, shall deliver and pay to such person or persons respectively, as the said court by its order and decree shall appoint and direct; then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

(Signatures and seals)

Taken and approved by and before me this day of, 19..

.....
County Judge.

| | | | |
|---|-----------------------------------|-----------------|---|
| In county judge's court, county, Florida. | Guardianship of | Guardian's bond | Filed, 19.., and recorded in book, page County Judge. |
|---|-----------------------------------|-----------------|---|

Oath

Before me,, county judge of the county aforesaid, personally appeared, who, being duly sworn say.. that will faithfully discharge the duties of guardian of the person and estate of, minor..; that will well and truly preserve all and singular the estate of said minor.., use and employ the same in the interest and for the benefit of said minor.., and render to and file in the county judge's court of said county of, a just, true and perfect inventory and account of said estate and of administration thereof when thereunto required.

(Signatures)

Sworn to and subscribed before me this day of, 19..

.....
County Judge.

3480 Illinois

Know all men by these presents, that we, of the county of, and state of Illinois, are held and firmly bound unto the people of the state of Illinois, for the use of minor, in the penal sum of dollars, current money of the United States, which payment well and truly to be made and performed, we bind ourselves, our heirs, executors and administrators, jointly, severally and firmly by these presents.

Witness our hands and seals this day of, 19..

The condition of this obligation is such, that if the above bounden, who has been appointed guardian of, shall faithfully discharge the office and trust of such guardian according to law, and shall make a true inventory of all the real and personal estate of the ward.. that shall come to ..h.. possession or knowledge, and return the same unto the county court of county, at

the time required by law; and he shall manage and dispose of all such estate according to law, and for the best interest of said ward., and faithfully discharge ..h.. trust in relation thereto, and to the custody, nurture and education of said ward., and render an account, on oath, of the property in ..h.. hands, and of the management and disposition of all such estate, within one year after ..h.. appointment, and at such other times as shall be required by law or directed by the court, and upon removal from office, or at the expiration of ..h.. trust, settle ..h.. accounts in said court, or with the ward., or ..h.. legal representatives, and pay over and deliver all the estate, title, papers and effects remaining in ..h.. hands, or due from ..h.. on such settlement, to the person or persons lawfully entitled thereto, then this obligation shall be void; otherwise to remain in full force and virtue.
(Signatures, residences and seals)²

3481 Maryland

(Caption)

Know all men by these presents, that we,, are held and firmly bound unto the state of Maryland in the just and full sum of dollars, current money of said state of Maryland, to be paid to the said state of Maryland, their certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, in and for the whole, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of, in the year nineteen hundred and

The condition of the above obligation is such, that if the above bounden, as guardian to, (born, 19..), of, late of, deceased, shall faithfully account with the orphans' court of county, as directed by law, for the management of the property and estate of the orphan under care, and shall also deliver up the said property agreeably to the order of the said court or the directions of law, and shall in all respects perform the duty of guardian to the said, according to law, then the above obligation shall cease; it shall otherwise remain in full force and virtue in law.

(Signatures and seals)

Signed, sealed and delivered in the presence of

.....
.....

² Add acknowledgment as in a deed.

Approved by the orphans' court for county,
on the day of, same day filed, recorded
and examined.

Test:

Register of wills for
county.

3482 Mississippi

(Caption)

Know all men by these presents, that we,
of the county of, and state of Mississippi, are
held and firmly bound unto the state of Mississippi, in the
penal sum of dollars, current money of the United
States which payment, well and truly to be made and per-
formed, we, and each of us, do hereby bind ourselves, our
heirs, executors, administrators and assigns, jointly, sever-
ally and firmly by these presents.

Witness our hands and seals, this day of,
19..

The condition of the above obligation is, that if the above
bounden, as guardian to, of
..... county, shall faithfully discharge all the duties
required of by law, and shall faithfully ac-
count with the chancery court of county for
the management of the property and estate of the orphan
under care; and shall also deliver up said property with
its increase and profits agreeably to the order of said court
or the directions of the law, and shall in all respects perform
the duty of guardian to the said, then the
above obligation shall cease; otherwise it shall remain in full
force and virtue in law.

(Signatures and seals)

Signed, sealed and delivered in
presence of

.....
Clerk of the chancery court.

I approve the above bond and the security thereto, this
day of, 19..

....., Clerk.

Oath

The State of Mississippi, }
..... county. { ss.

I,, do solemnly swear that I will faithfully
to the best of my ability discharge the duties of guardian to

....., minor heirs of, according to law; so help me God.

Sworn to and subscribed before me, this day of....., 19..

....., Clerk.

(Venue)

Personally appeared this day before me,, clerk of the chancery court of said county,, the sureties whose names are signed to the within bond, who being severally sworn, depose and say that they are worth over and above all their legal liabilities, and that they have visible property subject to levy and sale by execution over and above all property exempted by law from sale or debt, the said, the sum of dollars; the said, the sum of dollars.

.....
.....

Sworn, etc.

The above named, this day severally acknowledged before me,, clerk of the chancery court of county, Mississippi, that they signed, sealed and delivered the within and foregoing bond, on the day and date thereof, for the purposes therein set forth, as their act and deed.

Given under my hand and seal of office, this day of, 19..

....., Clerk.

| | | | | | |
|------------------------|-----------------|---------------------------------------|-------------------|-------------|--|
| Guardian's bond, oath. | Estate of | In the Chancery Court of County | Guardian to | Filed, etc. | Recorded in book, page, Clerk., D. C. |
|------------------------|-----------------|---------------------------------------|-------------------|-------------|--|

LETTERS

3483 District of Columbia

United States of America, } ss.
District of Columbia. }

In the Supreme Court of the District of Columbia,
Holding a Probate Court.

To all persons to whom these presents shall come, greeting:
Know ye, that on the day of, 19.., the supreme

court of the District of Columbia, holding a probate court, appointed, and, guardian, to, born, 19.., infant of, late of, deceased.

Witness, etc.

3484 Florida

(Caption)

To all to whom these presents shall come, greeting:

Whereas,, hath applied to the judge of the county judge's court of said county of, to be appointed guardian of, minor child.. of and it appearing to the judge of said court that said; and it also appearing to the judge of said court that said, is a fit and proper person to receive said appointment, and the said having in due form of law taken the oath and performed all other acts necessary to just qualification as such guardian:

Now, therefore, know ye, that I,, county judge in and for the county aforesaid, by virtue of the power and authority by law in me vested, do hereby declare the said duly qualified under and by virtue of the laws of said state, to act as guardian of said, and hath power, by virtue of these presents, to have the care, custody and control of said minor.., and duly entitled to take possession of and to have and to hold, for the benefit of said minor, all and singular the goods, chattels, credits and estate of said minor.. as shall be in accordance with law, during the legal continuance of said guardianship, until the said minor.. shall arrive at the age of twenty-one years, or until the said guardianship shall be duly revoked according to law.

In witness whereof, I hereunto set my hand and affix the seal of said court at, this day of, 19..

.....
County Judge.

3485 Illinois

State of Illinois, }
County of } ss.

The people of the state of Illinois, to, of said county, greeting:

Whereas, you were by the county court of said county, on the day of, 19.., appointed guardian of the person.. and estate.. of, aged years, on the day of, 19..;, aged years, on the day of, 19..;, minor.. of said county; and whereas you have com-

plied with the conditions of said appointment by giving bond with two sufficient sureties, in the penal sum of dollars, which bond has been approved by said court:

Now, therefore, know ye to whom these presents shall come, that the said, is duly constituted guardian of the estate of said minor.., and is authorized and required to have the care of ..h.. person.. and estate..; to present to said court, within sixty days from the date hereof, a just and true inventory, under oath, of all the real and personal estate belonging to said minor..; to lease the real estate of said minor.., upon such terms and for such time as such court shall by its orders direct; to render an account of ..h.. guardianship to said court for adjustment at the expiration of one year from the date hereof, and at least once every three years thereafter, and as much oftener as the court may require, until discharged by order of said court; to put to interest the money of said minor.. upon security to be approved by said court; and also to do whatever else the law requires of a guardian of the person.. and estate.. of minor.

Witness, (Clerk, etc.)

3486 Michigan

(Caption)

To, of said county, greeting:

Trusting in your care and fidelity, I do, by these presents, pursuant to the power and authority to me granted, constitute and appoint you to be guardian unto, minor;, the age of fourteen years, of, late of, deceased, with full power and authority to ask, sue for, recover, receive and take into your custody, all and singular the real estate, goods and chattels, rights and credits which accrue to in the right, or which by any other way or means whatsoever, doth of right appertain or belong to; you are to make a true and perfect inventory thereof, and return the same unto the probate court for the said county of, on or before the day of, next ensuing; you are to dispose of, manage, employ and improve the same according to law, and for the best interests of the said ward..; and within one year from the date hereof, and at such other times as the judge of probate shall direct, you are to render on oath unto the judge of probate for said county, a true account of the property of the said ward.. in your hands, of the proceeds of all the real estate that may be sold or mortgaged by you, and of the management and disposition of such property; and at the expiration of your trust you are to settle your accounts with the judge of probate, for the time being, or with the said ward.. or, legal representatives; you are to

pay over and deliver all the estate and effects remaining in your hands, and due from you on such settlement, to the person or persons who shall be lawfully entitled thereto, or otherwise, as the said judge by his decree or sentence pursuant to law, shall order and direct; and you are to do such other acts as the law in that behalf shall require.

In testimony whereof, I have hereunto set my hand and seal of the said court of probate.

Dated at, the day, in the year of our Lord, nineteen hundred and

....., Judge of Probate.

(Seal)

....., Probate register.

3487 Mississippi

State of Mississippi,)
..... county,)ss.

By the chancery court of said county, district.

Whereas, has been appointed, by this court, guardian of the person and estate of, minor child.. of

We, therefore, by these letters, authorize, as guardian as aforesaid, to discharge all the duties required of by law, or by the orders of this court.

Witness, honorable, chancellor of the
..... chancery district of Mississippi, on the first Monday of, in the year of our Lord, nineteen hundred and, and the seal of said court hereunto affixed.

Issued the day of, 19..

....., Clerk.

By, Deputy clerk.

ALLOWANCE AND INSTRUCTION

3488 Petitions (D. C.)

(Caption)

....., guardian of the above infant, submits to the court the communication of, and
....., herewith annexed, marked exhibit "A," touching the items of expense.. connected with the prosecution of the suit of said infant against the, out of which the fund described in said communication was realized. It is informed and believes, and therefore, avers that the attorneys for the plaintiff in said cause have vouchers for each of the several items mentioned in said communication, except the proposed fee for their own services; and it submits the several items in said communication mentioned for the approval

or disapproval of the court, and for an order thereon for its own guidance in the premises.

(Verification)

.....

b

(Caption)

Your petitioners show to the court as follows:

They were retained by, mother and next friend of the above named infant, to represent him in the law case number in this honorable court, to recover damages for an injury sustained by him in a railway accident on or about the day of, 19.., which suit was terminated heretofore, to wit, on the day of, 19.., by a compromise verdict of dollars, said compromise having been entered into with the approval and sanction of the court, and your petitioners are now in possession of the said sum of dollars, subject to certain costs and counsel fees to be approved by the court.

Heretofore, to wit, on the day of, 19.., the said, having recently died, made application to the court for appointment as the guardian of said infant, setting forth that the only known property to which he was entitled was dollars due under an insurance policy on the life of his mother, and the said was on the same day appointed guardian, upon giving bond in the sum of dollars. The said, as your petitioners are informed, has since collected dollars; all of which has been disbursed as the said claims, a part of it having been used according to the said guardian's statement in maintaining his own family expenses, without vouchers, and without authority from the court to use any part of the principal of the fund for the maintenance of said infant, the ground of the said application of said fund being, as claimed by the said, that the said infant resided with his family. Said is, as your petitioners are informed and believe, an illiterate man, a laborer by occupation, who can neither read nor write, and he is without proper qualifications to receive the larger fund now in hand; and your petitioners believe that, if said fund is paid to him, his ward will fail to realize the benefit thereof. Said ward, although nearly of age, is of extremely limited intelligence, and your petitioners believe is incapable of protecting his own interests; and, in view of the extremely small bond given by the guardian, and of said guardian's want of capacity for his office, your petitioners pray the instructions of the court as to their duty in the premises, and that such action may be taken as shall insure to the infant the benefit thereof.

.....

(Verification)

RESIGNATION

3489 Petition (D. C.)

(Caption)

The petitioner,, respectfully represents:

1. Heretofore, to wit, on the day of, 19.., a decree was passed by this honorable court appointing him to be legal guardian for, minor child of deceased.

2. That at the time of the petitioner's appointment as aforesaid, so far as he knew, the only goods, chattels and personal property to which was entitled was an insurance policy upon the life of the decedent,, in the sum of dollars.

3. That on or about the day of, 19.., he was informed, and it is a matter of record, that, by his next friend and mother,, filed a suit for damages against, for dollars on the law side of the supreme court of the District of Columbia law, number, docket number, page

4. That on or about, a verdict was returned in favor of the plaintiff.. and judgment was entered thereupon for dollars. Of this amount your petitioner is informed that after deducting all of the expenses, his ward, the said, will be entitled to about dollars.

5. That said dollars are now in the hands of, who was plaintiff's attorney in the said suit at law and who refuses to pay the same over to your petitioner until this petitioner's bond has been sufficiently increased to warrant such payment.

6. Petitioner is advised by said attorney that after deducting all expenses and his fees, there will remain a balance in his hands of about dollars, to which said ward is entitled as the sole heir at law of the said

7. That he is unable to give bond for dollars, which under the circumstances he has reason to believe the court would require.

He therefore prays that this honorable court relieve him or permit him to resign his position as guardian for said ward, and he hereby consents to the appointment of as such guardian if the same be agreeable to the said court and the said ward.

.....

(Verification)

3490 Resignation

(Caption)

I,, heretofore by this honorable court appointed guardian for, the minor, hereby resign

as such guardian and consent to the appointment of
..... in my stead, if the same is agreeable to the said court
and said ward.

3491 Order

(Caption)

....., the guardian heretofore appointed in this cause, having this day applied to the court to be relieved of his trust, and that another guardian be appointed in his stead, and the infant having personally appeared in court and expressed his wish that be appointed his guardian, but the said infant upon being examined by the court appearing to be of feeble mind and without sufficient ability to understand or care for his own interests in the premises, it is thereupon by the court this day of, 19.., upon consideration thereof and the petitions of and this day also filed herein, ordered adjudged and decreed that the said within from the date hereof, cause his account as guardian of said infant to be filed and presented to the court to be passed, and upon the passing of the same by the court, and the payment by him to the new guardian herein appointed of any balance which may remain in his hands or of which he is legally accountable, the said shall stand released of any further duties or responsibilities as guardian of the said infant.

And it is by the court further ordered, adjudged and decreed that be and he hereby is appointed guardian in the place and stead of the said for said infant when the said shall have complied with the terms of this order.

RELEASE AS SURETY

3492 Application

(Caption)

To the honorable, the judge of said court:

The petition of the company of
..... respectfully represents:

1. That it is a corporation duly incorporated under the laws of the state of Maryland, and is authorized by its charter to become sole surety upon bonds.

2. That it has complied with the requirements of the laws of the state of Maryland and is qualified to act as sole surety upon bonds in the state of Maryland.

3. That heretofore, to wit, on the day of, 19.., it became surety upon a bond in the penal sum of (\$.....) dollars given by, as guardian of,

and conditioned as required by law for the faithful performance of his duties as guardian.

4. That your petitioner is apprehensive of danger of loss by reason of its suretyship.

Wherefore, your petitioner prays an order of this honorable court requiring the said to appear in this court on a day to be named in said order and give a new bond as provided for by sections 457 and 590 of the Laws of the state of Maryland, made and passed at a session of the general assembly begun and held in 1902; and for a further order of court discharging your petitioner from further liability upon said bond.

And your petitioner further prays that the said may be required by an order of this honorable court to bring the estate in his hands into court and to settle an account showing his acts and doings up to the present time.

And your petitioner will ever pray, etc.

.....
By,
Vice-president.

(Corporate seal)

Order

(Caption)

This day company of Maryland appeared in open court and filed its application to be released as surety from the bond of, as guardian of, and that the said bring the estate in his hands into court and settle and account. It is ordered that the time of hearing said application be and hereby is fixed for the day of, 19.., at o'clock .. M., and that notice thereof in writing be given to said to be served upon him days before said day of hearing; and this cause is continued.

.....
Judge.

3493 Answer

(Caption)

To the honorable, the judges of said court:

The answer of, guardian, to the petition of the company of Maryland, asking to be relieved of the suretyship in the above entitled matter, respectfully represents that he holds himself ready to carry out any order or orders that may be passed by this honorable court in the premises.

And as in duty bound, etc.

.....
.....
Attorney for respondent.

3494 Account, exceptions

(Caption)

To the honorable, the judges of said court:

1. The company of Maryland, as surety upon the guardianship bond of, guardian of, excepts to the account filed by said as such guardian, because it is not such an account as is required by sections 151 and 152 of article 93 of the Code.

2. That the company of Maryland, as surety upon the bond of said, guardian of, excepts to that item in the account filed by said, guardian, filed on, 19.., which credits the estate of said with a note payable to her estate for \$....., for the reason that said \$..... represents a loan to said individually, and is not a proper loan and one not authorized by law to be made. That said account is in other particulars insufficient.

3. That said account shows that said guardian holds or purports to hold a note payable to his ward's estate for \$..... under order of court, and your exceptant says that the order of court referred to is an order purporting to have been made and passed on the day of, 19.., by the orphans' court of, as follows: (Set out order).

And your exceptant says that said order is void and of no effect, because it says that said court was without jurisdiction to pass such an order, in that the surety or investment mentioned therein is not such an investment as guardians are authorized by the statutes of this state to invest in nor do the statutes of this state authorize or empower said orphans' court of to approve of such investments.

4. And exceptant says that the said note mentioned in said account is insufficient security for said sum of and that said note is now and has been for more than months overdue.

And for other reasons to be assigned at the hearing.

.....

Attorney for exceptant.

(Venue)

Sworn to before me, the subscriber, a notary public of the state of Maryland in and for the city of, by, vice-president of the company of Maryland, this day of, in the year nineteen hundred and

.....

Notary Public.

3495 Account; exceptions, answer

(Caption)

To the honorable, the judges of the said court.

The answer of, guardian as aforesaid, to the exceptions of the company of Maryland to the account filed in compliance with an order of this honorable court respectfully represents:

1. That the account represents the true state of affairs relating to his guardianship.

2. That the loan of \$...... was made under and by virtue of an order of this honorable court and was proper and authorized by law.

And as in duty bound, etc.

.....
Attorneys for respondent.

.....
Guardian.

Sworn to in open court, 19..

Test:

.....
Register.

3496 Ordering new bond

(Caption)

It appearing to the court that, guardian of, has not accounted and filed a new bond as prayed for in the petition of, surety on said guardian's bond, it is hereby ordered that said, guardian of, file an account in this court and execute a new bond on or before, provided a copy of this order be served on said guardian on or before, 19..

Dated, etc.

REVOCATION

3497 Petition (Md.)

In the matter of the application of, to have letters of guardianship of; guardian to, infant, revoked and herself appointed.

To the honorable judges of the orphans' court of county.

The petition of, next friend and aunt of, infant, respectfully sets forth:

That on day of, 19.., was appointed guardian to by this honorable court.

That the said is no blood relative of the said, infant, as aforesaid, and your petitioner is informed and believes that the impelling motive that actuated this honorable court in so appointing the said guardian to the said, infant, as aforesaid, was that, the mother of the said guardian as aforesaid, would have the personal care of said infant.

That since the said appointment, however, the said has departed this life, and the said, infant, as aforesaid, is left altogether without that motherly care and attention which a child of his tender years should have, to his great injury and wrong.

That the said, infant, as aforesaid, is not even directly under the care or in the custody of his said guardian, but is residing with a person who has no legal authority over him and cannot have any personal interest in either his moral or material welfare.

That your petitioner, under the circumstances, actuated alone by love and affection, and being one of his nearest relatives alive, and desiring to promote the general welfare of her nephew, and being willing to give to him all the care of a parent, makes application to have the guardianship letters to the said revoked and that she be appointed in his place.

And as in duty bound, etc.

.....
Attorneys for petitioner.

3498 Rule to show cause

(Caption)

The application of in the above entitled matter having been read and considered, it is thereupon this day of, 19.., ordered that show cause on or about the day of, 19.., why he should not be removed as guardian to, as in said petition prayed, provided a copy of this order be served upon him on or before said date.

(Signatures)
Judges of the Orphans' Court.

Return

Upon the foregoing order, citation and copy of said order issued and delivered to the sheriff who returned same summoned and served this day of, 19..
....., Sheriff.

3499 Answer

(Caption)

To the honorable, the judges of said court.

The answer of, guardian of, an infant, to the petition of, against whom, the said guardian, in this court exhibited, respectfully sets forth:

1. That this respondent admits that he is the duly appointed guardian of the said, under the authority of this court.

2. That as such guardian, he has, since the said appointment, zealously guarded the property interests of the said infant and has filed in this court a full and true account of the said guardianship, as will more fully appear by reference to his first guardianship account duly examined and passed by this court on the day of, 19..

3. That the property of said infant consists almost entirely of a valuable farm located in county, , which farm this respondent is now renting to a responsible tenant under a written contract, and is being managed in a careful and husbandlike manner.

4. That since the appointment of this respondent and as such guardian he has carefully guarded the moral welfare of said infant, having visited him at regular intervals, and had him at all times under motherly environment.

5. That notwithstanding this respondent has a comfortable home of his own, to the end that said infant might have the watchful care of a mother and that influence and be more convenient to school, to which he has been regularly sent, this respondent has boarded him with, the mother of this respondent, who, he admits, is now deceased, and that owing to her death, he has since secured the services of a reputable Christian woman to continue to look after the welfare of said infant, as he will continue to do, during the period in which said infant is of tender years; and he therefore denies that said infant has ever been without motherly care and attention, except for a few days immediately after the death of the said, while this respondent was securing the service of a nurse for said infant.

6. That while this respondent admits that he is not a blood relation of the said, he avers that he was the second husband of his mother, the late, and is the father of, an infant, half brother of the said, said half brother being the nearest of kin of said, and also the ward of this respondent, under an appointment of this court; and that said infants are associated together by this respondent as much as the circumstances will permit.

7. This respondent avers that said has at all times, under the circumstances hereinbefore set forth, been di-

rectly under the care and custody of said respondent; he denies that he has ever been under the care of any person who has no personal interest in either his material or moral welfare; and while not assuming to know, as the petitioner does, as to what was the impelling motive which influenced this court in his appointment as guardian of said, he avers that the said death will not, under the management of the said guardian, affect the material or moral welfare of said

Wherefore, he prays that the said petition be dismissed with proper costs to this respondent.

And as in duty bound, etc.

.....
Respondent.
Guardian of

(Venue)

I hereby certify that on this day of, 19.., before the subscriber,, in and for, county,, personally appeared, guardian of, and made oath in due form of law, that the matters and things set forth in the foregoing answer are true as therein stated, to the best of his knowledge and belief.

.....
(Official character)

3500 Order dismissing

(Caption)

The petition, answer and testimony in the said case, having been read and duly considered, it is hereby ordered by the said court this day of, 19.., that the petition of the said, so far as it relates to the removal of the said, be granted and that the part of the petition which relates to the appointment of said, as guardian in the place of said, be dismissed. And it is further ordered by the said court that the said, the respondent, pay the costs of this case.

3501 Order appointing new guardian

(Caption)

It is this day ordered by the court of county that be, and he is hereby, appointed guardian of, infant, in the place of, whose letters of guardianship have this day been revoked by order of said court.

SALE AND INVESTMENT

3502 Petition (Ill.)

In the court of county,
..... term, 19..

To the honorable, the judges of said court.

The petition of, guardian of,
....., minors, respectfully shows:

That is of the age of over years, and upwards, and that and are of the ages of less than fourteen years each, and that your petitioner was duly appointed guardian of the estates of each of said minors by the probate court of county, on the day of, 19..

That on or about, 19..,, of the city of, county of, and state of Illinois, as the owner in fee simple of, (Describe property) in, county, Illinois, conveyed the same by warranty deed to, of

That as a matter of fact, such conveyance was made to indemnify said for loss in respect to a certain liability for a portion of which said held himself bound.

That said died on the day of, 19.., leaving him surviving his widow, and children, to wit,, and that your petitioner and were duly appointed administrator and administratrix of estate, and qualified as such

That between the giving of said deed to said, and the death of said, the latter (Set forth circumstances).

Your petitioner further shows that subsequently said real estate was sold by (Set forth facts).

That by reason of the premises, there vested in each of the minors represented by your petitioner herein, an apparent interest of of the interest of in the real estate in question.

That the entire estate of said minors in the real estate in question consists in their portion of the estate which had descended to them as heirs of the said; which estate of said receives the benefit of the credit allowed by the administration of said estate for the moneys so realized by them from said for said equity of redemption; and as between said minors and said said minors should not set up a claim to any portion of the land itself otherwise than as being subject to the prior lien thereon in favor of said, and to the operation of the foregoing facts.

That the interest of said minors in the land in question

under the circumstances is but of small value and would be nearly unavailing to them because of the smallness of their interest in the land, and that upon the whole, it would be for the best interests of the minors to dispose of said interest, rather than to seek to have the same set apart, and said minors cannot make said interest availing otherwise than by a sale of their said interest.

Your petitioner further shows that it is desirable and proper that this apparent interest should be sold for the purpose of investing the proceeds.

Wherefore, in consideration of the premises, your petitioner prays that this court will order and direct your petitioner to sell the interest of said minors in said real estate, and make such further orders herein, as to this court may seem proper.

.....
Guardian of

(Verification)

(Michigan)

(Caption)

Your petitioner respectfully represents to the court that on the day of, 19...,, was duly appointed by said court, guardian of the person and estate of said; that the value of the personal estate of said ward is about the sum of dollars; and that the nature and condition thereof is as follows: (State condition).

Your petitioner further represents that said ward is the owner of all the following described real estate, the description, condition and value of each parcel thereof, and of the whole of said real estate, according to the information and belief of your petitioner, are as follows, viz: (State the same).

Your petitioner further represents that said ward is of the age of years, and on account of, is not able to render much, if any, assistance in supporting himself and his family, which consists of the following persons, whose names and ages are as follows: (State names and ages).

Your petitioner further represents that as far as can be ascertained by, and as is informed and verily believes, the charges and expenses of managing and administering said estate will amount to the sum of dollars per annum, and that the sum of dollars per annum is necessary and required for the proper support and maintenance of said ward and his said and for the education of said or the children of said

Your petitioner further represents that the income from said estate, in its present condition, will not exceed the sum of dollars per annum, and is not sufficient for the purposes aforesaid, and is not as large an income as said real

estate will produce if sold and the proceeds otherwise invested; that there can be realized from the sale of said real estate, the sum of dollars which can be readily put out on interest or invested in other more productive real estate or productive stocks, and when so invested, will produce an income of dollars per annum, or thereabout; and that it would be for the best interest and benefit of said ward that said real estate, or some part thereof, be sold, and the proceeds thereof invested as aforesaid, as your petitioner is informed and verily believes.

Your petitioner further represents that the names and residence of the next of kin of said and all other persons interested in said estate, as your petitioner is informed and believes, are as follows: (Give names, etc.).

Wherefore, your petitioner prays that may be authorized, empowered, and licensed to sell the real estate hereinbefore described, with the hereditaments and appurtenances, or so much and such part thereof as the court shall determine to be necessary and most for the benefit of all persons interested, for the purpose of paying the expenses and charges aforesaid, and expending or investing the proceeds thereof as the court shall direct, for the purposes above mentioned, according to the provisions of the statute in such case made and provided.

(Verification)

Superintendents', etc., approval

State of Michigan, } ss.
County of }

We,, superintendents of the poor of said county, hereby certify, that we approve of the proposed sale of real estate herein mentioned, and deem the same necessary.

(Virginia)

(Caption)

To the honorable, judge of the court of county:

Humbly complaining, your complainant, guardian of infant children of, sheweth unto your honor that he was appointed and qualified as the guardian of the said infants in your honor's court on the day of, 19.., as will appear from a certificate of the clerk of the court showing the same, herewith filed, marked "A," and prayed to be taken as a part of this bill. That the said infants are aged as follows: (Give names and ages). That the said infants are the owners in fee simple of the following real estate situated in the of, viz.: (Describe same). The said real estate was derived by said

infants by That this is all the property, real or personal, which the said infants own except

In your complainant's judgment, the interests of his wards will be greatly promoted by a sale of the real estate first above mentioned, and by an investment of the proceeds in other property, as provided by the statute of Virginia; and he thinks the following facts are calculated to show the propriety of such sale and investment: (Briefly state these facts). And your complainant believes that the rights of no person will be violated by such sale and investment.

If the said infants were dead, the following persons would be their heirs or distributees, viz.: (Name them).

In tender consideration of the premises, and forasmuch as your complainant is remediless therein, save in a court of equity, wherein such matters are cognizable and relievable, your complainant therefore prays that the said infants under the age of twenty-one, and, may be made parties defendant to this bill, and required to answer the same; the infants by their guardian *ad litem* to be assigned them, and the adults in their proper person, though not under oath, the answer under oath being hereby waived; that a guardian *ad litem* may be assigned the said infants to defend their interests in this suit; that the said land may be decreed to be sold, and the proceeds invested as the court shall direct; that all proper allowances and counsel's fees may be made in this suit; that all proper accounts may be taken, and inquiries directed; and that such other and further and general relief may be granted, as to equity and good conscience may seem meet and proper. Let subpœna go. And your complainant will ever pray, etc.

(Venue)

I,, a notary public in and for the aforesaid, do hereby certify that, the complainant in the above suit, this day personally came before me in my aforesaid, and made oath that he believes the several statements made in the foregoing bill to be true.

Given, etc.

Notary Public.

(West Virginia)

(Caption)

To the honorable, the judge of the circuit court of county, West Virginia:

The petition of, guardian of, respectfully shows unto your honor that was in his lifetime, seized and possessed in fee simple of the undivided one-half interest in and to a certain tract of land lying and being in district, county, West Virginia,

and hereinafter described; and, being so seized and possessed, some time in the year 19.., departed this life, leaving to survive him his widow,, and, and as minor children, born of the body of said, the said, and being infants under the age of twenty-one years. The decedent left a will, wherein and whereby he devised his said interest in tract of land hereinafter described to "my wife,, and my children born of her body * * * the same to be used for their maintenance and support and the education of said children." The said will was duly probated and is recorded in said county in will book No. at page

That said,, and are the owners in fee simple of the undivided one-half of said tract of land hereinafter described, and that each of them is the owner of the undivided one-..... interest in said tract of land.

That said petitioner, on the day of, 19.., was by the clerk of the county court of said county, duly appointed and qualified as said guardian of the said, an infant, and is now his legal and lawful guardian. Office copy of said appointment marked exhibit "A," is herewith filed as part hereof.

That his interest in said tract of land is the only real estate or interest in real estate owned or claimed by said, infant.

That the personal property owned and claimed by said infant will not exceed dollars in value.

That said tract or parcel of land is situate in the district of and is bounded and described as follows, to wit: (Insert legal description) containing one acres, more or less.

That the quality of this land is the same as the average land in that section, having nothing special to commend it for fertility or resources of profit to the ward of your petitioner except that oil may possibly be found therein.

That said widow,, and the respective guardian of the minor children of said, deceased, hereinbefore mentioned, by a certain deed of writing, duly signed and acknowledged by them, bearing date the day of, 19.., for a valuable consideration, did grant, demise, sell and let unto company, a corporation organized and existing by virtue of the laws of the state of West Virginia, for the term of years and as much longer as oil or gas is produced in paying quantities, their interest in said tract of land for oil and gas purposes, upon the terms, conditions and stipulations contained in said lease; and that said lease is now held and owned by the said company; a true copy of which said lease is hereto attached and filed as a part hereof and marked exhibits "B" and "C."

That the said company has offered to purchase

the undivided interest of the said in and to the undivided of the oil and to all of the gas within and underlying said tract of land, upon the terms and conditions named in said lease executed as aforesaid; and that the terms and conditions therein are practically the same as those contained in leases of adjoining lands.

Petitioner is advised and believes that the oil and gas, if any, underlying the lands adjoining and surrounding said tract of land have, for the most part, been leased upon the usual and customary terms upon which lands in that neighborhood are leased for oil and gas purposes; and he is advised and believes that the interest of the said infant will be promoted and greatly benefited by a sale of his interest in and to the undivided of all the oil in and to all the gas within and underlying said tract of land; and especially so if drilling and operations for oil and gas are had on adjoining lands. That said infant has no means of ascertaining the existence of or of operating for and producing, the oil and gas, if any, underlying said tract of land.

Petitioner is advised and believes that with authority so to do, he can sell the interests of said infant in and to the undivided of the oil and in and to all of the gas within and underlying said tract of land, reserving unto said infant his proportionate share of the usual royalty of oil not sold, together with the necessary rights and privileges for searching for and developing the same, for a sum of money as bonus, and in addition thereto he may require the purchaser to drill and complete a well for oil upon said tract within a reasonable time thereafter, free of costs to the said infant or his guardian, or in lieu thereof to pay to said infant or his guardian, for delay in drilling a quarterly rental of \$..... payable in advance until said well shall be drilled and completed thereon or the rights and privileges of the purchaser are surrendered for cancelation.

Petitioner is advised and believes that the interest of said infant in the premises and the rights and privileges which are sought to be sold in this proceeding can only be sold and disposed of by a decree of this honorable court; and petitioner is advised and believes, that the interest of said infant will be promoted by a sale of his undivided interest in of the oil and in all the gas within and underlying said tract; and that the rights of no person will be affected or jeopardized thereby.

Petitioner is advised and believes that the parties above named are all of the persons interested in said land or having claim or charge upon or against said land.

Petitioner, therefore, being without remedy at law, prays that the said defendants,, be made parties defendant to this petition; that a guardian *ad litem* be assigned said infants, who shall answer the same for them and protect

their interests herein; that the said guardian *ad litem* be required to attend said court and protect the interests of said infants.

That at the hearing it may be decreed that petitioner, or some other person appointed by the court for that purpose, do sell, on such terms and conditions as the court may decree, at either public or private sale, to the highest bidder for cash in hand all the interest of said infant, the said in and to the undivided of the oil and to all the gas within and underlying said tract of land, with the right and privilege to the purchaser thereof of entering upon said tract of land, and of drilling, boring, excavating and operating for oil and gas and of producing the oil and gas within and underlying the said land as fully as said infant could do himself, together with the other rights and privileges and subject to the covenants and conditions to be kept and performed by the purchaser which are contained and which are set forth at large in the copy of the lease attached hereto and made a part hereof and marked exhibit "B."

That all proper orders and decrees be entered including such decrees as may from time to time be necessary to properly secure, protect, manage and preserve the fund or funds that may arise in pursuance of or from such purchase and the securities in which the same may be invested, and for the protection of the rights of all persons interested or who may become interested therein, whether such rights be vested or contingent; that petitioner have all such other relief, both general and special, as to the court shall seem proper, or as the nature of this case may require.³

.....
Guardian.

(Verification)

Order

(Caption)

Upon motion of, guardian, by counsel, leave is granted to him to file his petition in the above entitled cause, and the same is accordingly filed, and the court hereby appoints, guardian *ad litem*, to defend the interests of, the infant defendant in this case.

3503 Notice of application (Ill.)

State of Illinois,}
..... county. {ss.

County court of county.

In the matter of the application of, as guardian of, minor, for leave to sell real estate.
To the above named minors, and all persons to whom it may concern:

³ Wells v. Simmons, 61 W. Va. 105 (1906).

Take notice that the undersigned, as guardian of the above named minor., will make application to said court at the term thereof, to be held at the county court room, in the city of, county, Illinois, on the Monday of, 19.., for an order to sell the following described real estate, belonging to said minor., situated in the county of, and state of Illinois, to wit: (Insert legal description); and that a petition therefor was duly filed in the office of the clerk of said court, in manner and form as is provided by statute in such cases.

.....
Guardian of said minor..

Dated, 19..

Proof of service

(Caption)

....., being first duly sworn, doth depose and say that on the day of, 19.., he served upon minors, a copy of the notice of the application of said, for leave to sell their real estate, by delivering to each personally a copy of the printed notice thereof of the same words and figures as the following notice hereto attached, viz.: (Insert notice); and further this affiant, saith not.

.....
Subscribed, etc.

(West Virginia)

(Caption)

To the above named defendants, and

You are hereby notified that the undersigned,, guardian of, infant, on the day of, 19.., at the court house at, in county, West Virginia, in the circuit court of said county, will apply by petition to said court for permission and authority to sell, either at public or private sale, and on such terms as the court may prescribe, all the undivided interest, right, title and claim of the said in and to the undivided of the oil and all of the gas within and underlying all that certain tract or parcel of land situate in district, county, West Virginia, bounded substantially as follows, to wit: (Insert description) containing acres, more or less, together with the right and privilege to purchaser thereof to enter upon the said tract or parcel of land and bore, mine, excavate and produce said oil and gas, and of laying pipe lines, either on top or beneath the surface of said land,

for the transportation of oil, gas or water, and of building tanks, stations and structures on said land to take care of said oil and gas, and of using sufficient water and gas from said land to run all necessary machinery, with the right and privilege, at any time, to remove all or any machinery, engines, fixtures, offices or buildings, placed on said land by the purchaser.

At which time and place you may attend if you see fit.

Given under my hand this day of, 19..

.....

Guardian.

.....

By counsel.

Proof of service

(Venue)

Before me the undersigned authority, personally came, who being duly sworn according to law, deposes and says that he served the within notice on the within named, by delivering to them and each of them a true copy of the same on the day of, 19.., at their homes in county, West Virginia.

.....

Taken, sworn, etc.

3504 Answer, guardian

(Caption)

The answer of, infants, under the age of twenty-one years, by (a discreet and competent attorney at law), their guardian *ad litem* assigned to defend them in this suit, and the answer of the said guardian *ad litem* of the said defendants, to a bill of complaint exhibited against the said infants and others by, in the court, of the of

For answer to the said bill the said infant defendants by their said guardian *ad litem* answer and say that being of tender years they do not know what their true interests are in relation to the subject matter of the said bill, nor do they know whether the statements therein contained are true or not. They confide the protection of their interests therein to the care of the court. And the said guardian *ad litem* of the said infant defendants for answer to the said bill answers and says that he knows nothing as to the truth or falsity of the statements in the bill contained. He therefore prays full protection for the infant defendants. And now, having fully

answered, these defendants pray to be hence dismissed, with their costs, etc.

By
Guardian *ad litem*.

Guardian *ad litem* of said infants.

Sworn to before me in my aforesaid, by
....., guardian *ad litem* as aforesaid, this day
of, 19..

.....
Notary Public.

3505 Answer, infant

(Caption)

The answer, under oath, of infants under the
the age of twenty-one, but over the age of fourteen, to a bill of
complaint exhibited against them and others by
in the court of the of

For answer to the said bill these defendants say that
years of age; that they, by reason of their tender years, know
but little of the allegations of the said bill; that so far as they
do know, they believe the same to be true, and they see no reason
why the prayer of the bill should not be granted, and accordingly
they concur therein, but they rely upon the court to protect
their interests.

And now, having fully answered, they pray to be hence dismissed,
with their costs.

And they will ever pray, etc.

Sworn, etc.

3506 Answer, adult

(Caption)

The joint and separate answer of to a bill in
equity exhibited against them and others in the
court of the of by

These respondents saving and reserving, etc., for answer to
said bill say that they believe the statements therein made are
true. These respondents do not object to the sale of the land
as prayed for in said bill; they concur in the prayer of the said
bill.

And now having fully answered, they pray to be hence dismissed
with their costs, etc.

3507 Reference

(Caption)

This day came, guardian, and by leave of
court filed his bill, verified by his oath thereto, and the exhibits
therewith; and on his motion, a discreet and
competent attorney at law, is assigned as the guardian *ad litem*

to the infants, to defend their interests in this suit. And thereupon the said guardian *ad litem* filed the answer of the said infant defendants, and his own answer on oath, to the bill of the complainant; and the said, infants over fourteen years of age, filed their own answer on oath to the said bill; and the adult defendants filed their own answer to the said bill; to which several answers the complainant replied generally. Thereupon, by consent of all parties, by counsel, this cause is set for hearing and is docketed; and by like consent came on this day to be heard on the bill of complaint and the exhibits therewith, the several answers of the defendants to said bill as above set out, and the general replication of the complainant to every one of said answers, and were argued by counsel.

On consideration whereof, the court doth adjudge, order, and decree that this cause be referred to one of the commissioners of this court, who is directed to enquire and report to the court, as follows: 1, Of what estate, real and personal, the infant defendants are possessed or entitled, and what are their respective shares or interests therein, where such estate is situated, and what is its fee-simple and annual value; 2, Whether the interests of the said infant defendants will be promoted by a sale of the real estate in the bill mentioned, or any part thereof, and by an investment of the proceeds of sale in other property; 3, Whether the rights of any person will be violated by such sale and investment; 4, Who would be the heirs at law or distributees of the said infant defendants if they were dead, and whether all such persons are properly before the court in this cause; 5, What will be a fair compensation to be allowed to the counsel for the complainant out of the proceeds of sale of the infants' land for their services in instituting and conducting this suit.

Which said inquiries the said commissioner shall make, after first giving notice of the time and place thereof to all parties, or their counsel, and report the same to the court, along with any matter specially stated deemed pertinent by himself or required by any party to be so stated.

3508 Notice

(Caption)

4 Office of commissioner,
Va.,, 19..

To the parties to the above suit:

I have fixed on the . . . day of, 19.., at . . . o'clock . . M., as the time, and my office aforesaid, as the place for executing the decree of which the foregoing is an extract.

4 Precede this by extract from Section 3507, reference decree, commencing with "The court doth ad-

judge, order," etc., and concluding with last phrase "to be so stated."

Given under my hand as commissioner in chancery of the
 court of the of
 the day and year aforesaid.

....., Commissioner.

We hereby acknowledge legal service of the above notice :
 Counsel for the complainant and adult defendants.
 Guardian *ad litem* of the infant defendants.

3509 Depositions

(Caption)

The depositions of, and others, taken on the
 day of, 19.., before, a commis-
 sioner in chancery of the court of the
 of, at his office, No., in the
 of, state of Virginia, to be read
 as evidence in a certain suit depending in the said court, under
 the general style of, guardian, etc., v.
, et al., and referred to the said commissioner for
 certain inquiries, accounts and report.

Present: Mr., counsel for the complainant,
 and the, adult defendants; Mr.,
 counsel for; Mr., guardian *ad*
litem for the infant,, defendants.

....., having been first duly sworn, depose as fol-
 lows, to wit:

1. Question by, counsel for the complainant,
 etc. State your age, residence, and occupation?

Answer: (Give same).

2. State whether or not you are acquainted with the real es-
 tate belonging to the infant defendants, described in the bill.
 If yea, how long you have known the same, and what have been
 your opportunities for knowing the same? What is the fee sim-
 ple and annual value thereof?

Answer: I am acquainted with the said real estate, having
 known the same for years. It consists of (Complete an-
 swer).

3. State whether or not, in your opinion, the interests of the
 infant owners will be promoted by a sale of the same and by an
 investment of the proceeds in other property. Will the inter-
 est of any person be violated by a sale and by an investment of
 the proceeds?

Answer: I think their interests will be promoted by a sale, for
 the reason that (Give reason).

(Proceed similarly with other questions)

3510 Report

(Caption)

To the honorable, judge of the
court of the of

In pursuance of a decree of your honor's court, entered in the suit of which the above is the general style, on the day of, 19.., I gave notice to the parties that on the day of, 19.., at o'clock A. M., and at my office aforesaid, I should proceed to execute the said decree. The said notice, with service of the same acknowledged by the counsel for the complainant and the adult defendants and guardian *ad litem* of the infants, is herewith returned.

I attended at the time and place so appointed, and in the presence of of counsel for the complainant and the adult defendants, and of, the guardian *ad litem* of the infant defendants, I took the depositions of

The said depositions are herewith returned, and after consideration of the same, together with the pleadings in the cause, I respectfully report:

1. The infant defendants are possessed of or entitled to the following property, viz.: *a*, real estate; *b*, personal estate. Their shares or interest therein are each. The fee simple value of the same is dollars, and its annual value is gross, or dollars net after the payment of taxes, insurance, agents' commissions, and repairs.

2. The interests of the said infants will be promoted by a sale of the said real estate and an investment of the proceeds thereof in other property.

3. The rights of no person will be violated by such sale and investment.

4. would be the heirs at law or distributees of the said infants if they were dead. Such persons are properly before the court in this cause.

5. I consider that the sum of dollars would be reasonable and fair compensation to be allowed the counsel for the complainant and the adult defendants, for their services in instituting and conducting the proceedings in this suit through its successive stages.

Respectfully submitted,

.....
Commissioner.

Commissioner's fee, \$.

3511 Hearing, order

(Caption)

This day came the plaintiff, by counsel, and presented to the court a notice which has been duly and legally served upon the

defendants, and each of them as required by law, as it appears by the endorsements thereon, showing that he would file a petition asking for leave to sell the interest of the said in and to the, in a certain tract or parcel of land, particularly described in said notice and asking that said notice be docketed and the case set for hearing; which is accordingly done.

3512 Decree (Va.)

(Caption)

This cause came on this day to be again heard on the papers formerly read and on the report of commissioner, dated, 19.., and filed on, 19.., to which report there is no exception taken, and counsel for the adult parties and the guardian *ad litem* for the infant defendants, by endorsement on said report, having waived the ten days for exception, and on the depositions of witnesses returned with the said report, and was argued by counsel.

On consideration whereof, it being clearly shown from said report and the evidence returned therewith, independently of any admissions in the answers, that the interests of the infant defendants will be promoted by a sale of the real estate hereinafter mentioned and a re-investment of the proceeds thereof in other property; and the court being of opinion that the rights of no person will be violated thereby, the court doth approve and confirm said report; and doth adjudge, order, and decree that, who are hereby appointed special commissioners for the purpose, any one of whom may act, do, after having advertised the time, place, and terms of sale for five successive times in some newspaper published in the of, proceed to sell in one or more parcels, as the commissioners shall see fit, at public auction, the land in the bill and proceedings mentioned, viz.: (Describe same), upon the terms of in cash, and the residue in three equal instalments, payable respectively at months from the day of sale, the credit instalments to be evidenced by notes of the purchaser, with per centum per annum interest from the day of sale added, and the title of the property retained as security for the said notes until the whole of the purchase money is paid and a conveyance directed by the court. And the said commissioners are directed to deposit the said notes and the cash instalment in the bank of, to the credit of the court in this cause, and to report their proceedings hereunder to the court, returning therewith a certificate of deposit of such notes and cash.

But the said commissioners shall have no power to execute this decree until they, or the one or ones who act, shall enter into bond with sufficient security in the clerk's office of this court, payable to the commonwealth of Virginia, in the penalty

of dollars, and conditioned for the faithful discharge of their duties hereunder.

3513 Notice of sale (Ill.)

Guardian's sale

(Venue)

By virtue of a decretal order in the county court of said county entered at the term, 19.., of said court on the application of the undersigned, guardian of, minors, to sell the following described real estate, viz.: (Describe property), belonging to said minors, I shall on, the day of, 19.., at the hour of .. M., at, in the city of, in said county of, sell the said real estate at a public sale to the highest and best bidder—terms of sale, as follows: (Insert terms of sale).

.....
Guardian of, minors.

3514 Report of sale (Ill.)

(Caption)

To the honorable,, judge of said court:

The undersigned,, guardian of, would hereby represent that by virtue of a decree entered in the above entitled cause, she did on the day of, 19.., between the hour of in the forenoon and o'clock in the afternoon of said day, to wit, at the hour of .. M., of said day, at the, in the city of, in county, in the state of Illinois, offer for sale at public vendue, the real estate described in said decree; and thereupon one,, bid the sum of dollars for the estate and interest of said minors, described in said decree, viz.: in said county of and state of Illinois; and the said being the highest and best bidder for said described real estate and interest, the same was struck off to him for the sum aforesaid. And she further reports that previous to making said sale, she caused a notice thereof of which the annexed is a true copy to be published for three successive weeks in the, a secular newspaper published at, in said county, where said real estate and interest were sold.

And she further reports that said paid to her on the day of said sale, the sum of dollars, and that he is ready and willing to take a conveyance and pay the residue of the money to be paid in cash and to execute the notes and mortgage for deferred payments, pursuant to the provisions of the decree entered in the above entitled cause, upon the execu-

tion of a deed to him by the undersigned upon the approval of said sale and the ordering of a conveyance thereof by this honorable court.

And the undersigned further reports that the said sale was made at the time and place mentioned in said notice. And in strict accordance with the orders of this honorable court, and was in all respects fairly and impartially conducted as she verily believes. She therefore respectfully asks and requests that the said sale so made as aforesaid may be confirmed and that she may be authorized and empowered to execute proper conveyance to said purchaser of said real estate and interest. All which is respectfully submitted.

.....
Guardian of, minors.

3515 Deed (Ill.)

This indenture made this day of, 19.., between of the city of, in the county of, and state of Illinois, the duly appointed and qualified guardian of, minors, under letters issued from the probate court of county, in the state of Illinois, as such guardian, party of the first part, and of, party of the second part, witnesseth:

That whereas, the said party of the first part as such guardian, on day of, 19.., more than ten days before the commencement of the term of the court to which such application was made, filed her petition in the court of said county, praying upon legal cause therein set forth for an order to sell the real estate belonging to said wards hereinafter described, and gave notice of such application to all persons concerned by publication in (a newspaper published in said county of) once a week for three successive weeks before the session of the court to which such application was made, and also served said wards with a copy of such notice ten days before the hearing of such application; and whereas, the said court, after hearing said application on day of, 19.., did by order duly entered empower and direct the said as such guardian to sell at public vendue the real estate of such wards hereinafter described, as prayed in said petition; and whereas, in pursuance of said decretal order of the court aforesaid, the said party of the first part, as such guardian as aforesaid having given due public notice of the intended sale by causing a notice of the terms, time and place of such sale, together with a description of the real estate to be sold, to be published for three successive weeks prior to the said sale in, a newspaper published in said county, agreeably to the order and direction of the said court, did on day of

....., 19.., pursuant to the order and notice aforesaid, sell at public vendue, the real estate of the said wards herein-after described to, the said party of the second part, for the sum of dollars, he being the highest bidder therefor; and whereas, the said party of the first part made return of this proceeding and sale under said order to said court, and the said court having carefully examined the same on the day of, 19.., finding the same correct, did approve and confirm the same and ordered the said as such guardian to execute, acknowledge and deliver a deed of the said real estate to the said party of the second part on his complying with the terms of said sale; and whereas, the said party of the second part has in all things complied with the terms of said sale, on his part to be performed;

Now, therefore, this indenture witnesseth that the said party of the first part in consideration of the premises, and the sum of dollars, to her in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained and sold, and by these presents doth grant, bargain and sell unto the said party of the second part, his heirs and assigns, forever, all the following described lot, piece or parcel of land, situated in the county of, and state of Illinois, and known and described as follows: (Describe land). Together with all and singular the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and all the estate, right, title, interest, claim and demand whatever at law or in equity of said wards, minors, in and to said premises whatsoever; and to hold the same unto the said party of the second part, his heirs and assigns forever as fully and effectually to all intents and purposes in law as she, said party of the first part, might, could or ought to sell and convey the same by virtue of the said decretal order of said court described and above referred to.

In witness whereof, the said party of the first part, as guardian as aforesaid, has hereunto set her hand and seal the day and year above written.

.....
As guardian of,
minors.

3516 Order approving

(Caption)

And now, to wit, on the day of, 19.., comes, the above named guardian, and files his report of the sale made by him of real estate pursuant to an order of this court, made herein upon the day of, 19.., and presents therewith his conveyance of said real estate to the purchaser at said sale for approval; and it appearing to the

court that the said guardian, in making said sale, has complied with the directions of the statute and of said order, and that said conveyance is in due form, it is ordered by the court that the said report and conveyance be severally approved, and the deed conveying the said real estate be delivered to the purchaser thereof.

ACCOUNTS

3517 District of Columbia, account

| | | | Assets | Received | Disbursements | |
|-------|-------|------------------|--------|----------|---------------|-------|
| | | Brought forward, | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | | | | | |
| | | Totals, | | | | |

District of Columbia, to wit:

..... and, guardian.. of,
 minor.., do solemnly swear that the foregoing account is just
 and true, and that have bona fide paid, or secured
 to be paid, the several sums for which claim..
 credit and allowance.

.....
 Sworn to and subscribed before me this day of
, 19..

.....
 Register of wills for the District of Columbia,
 Clerk of the Probate Court.

Order

In the Supreme Court of the District of Columbia,
 Holding a Probate Court.

On this day of, 19.., the foregoing ac-
 count, being now presented for approval, the same is, after
 examination by the court, approved and passed.

.....
 Justice.

3518 District of Columbia, affidavit in lieu

(Caption)

....., being first duly sworn according to law, deposes
 and says that he is the duly appointed guardian of her minor
 children, as mentioned in the guardian proceedings in case

number now pending in the probate court of the District of Columbia, wherein it is set forth in the petition filed by affiant that, deceased, during her lifetime transferred and assigned her policy upon her life which was in one of the District of Columbia's council known as the (Describe order), while the policy called for dollars, it was also provided therein that after her funeral expenses were paid the remainder should be paid to the minor children, namely: and; that the sum of was received at the division of (Describe order) and that they took therefrom dollars to cover the funeral expenses of, which was paid in the presence of, whose business place is located at, and the balance paid to your affiant as guardian; that to the best of her knowledge, information and belief there remains now no outstanding claims or just debts against; and your affiant having paid all the expenses incident, files this affidavit in lieu of an account.

Subscribed, etc.

Order

On this day of, 19.., the foregoing affidavit in lieu of account being now presented for approval, the same is, after examination by the court, approved and passed.

3519 District of Columbia, order to pay over

(Caption)

It appearing to the court that the guardian of said minor has filed its final account in this cause showing a balance on hand of dollars, and the said account having been approved and passed by the court on the day of, 19..; and it appearing further to the court that the said minor became of age on the day of, 19.., it is this day of, 19.., ordered, adjudged and decreed that the said be and it is hereby directed to deliver and pay unto the said or his properly authorized agent or agents the said sum so held by it as guardian as aforesaid.

3520 Maryland

The first account of guardian of his minor daughter.

This accountant charges himself with amount received from

the estate of, deceased, viz.: (Make itemized statement of receipts).

And he craves allowance as follows:

Balance of estate due ward: (Give itemized statement of same).

Note: Register's fees, this account and copy, \$.

(Venue)

On the day of, 19.., came, guardian of, minor, and made oath in due form of law that the foregoing account is just and true as stated, and that he has paid or secured the payment of every sum or sums for which he craves an allowance; which, after an examination, is passed by order of the orphans' court.

Test:

Register of wills for city.

3521 Mississippi

Dr. Estate of, minor,
, Guardian..
 } The guardian.. pray allowance
 Term, 19.. } for the following disbursements,
 losses and commissions on account
 of ..h.. guardianship, to wit:
 account

| To whom paid | On what account | No. of Voucher | Amount |
|--------------|-----------------|-------------------|--------|
| | | | |
| | | | |
| | | | |

In account with, Cr.
 of the estate of, minor.
 } The said guardian.. charge..
 Term, 19.. }sel.... with the following re-
 cepts had by ..h.... in behalf of
 said estate, to wit:

| When received | Of whom received | On what account | Amt. |
|---------------|------------------|-----------------|-------|
| | | | |
| | | | |
| | | | |

| |
|---|
| No. |
| Guardian's Account. |
| Estate of Minor. |
| In the Chancery Court of County |
| Guardian. |
| Filed, etc. |
| Approved and allowed Term, 19.. |

CHAPTER LXI

HABEAS CORPUS

IN GENERAL

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IN GENERAL

3522 Law governing, statute, scope

The Habeas Corpus act of Illinois purports to cover the whole subject upon *habeas corpus* and creates a complete code of procedure prescribing what the petition shall contain, the form of the writ, how it shall be served, and provides for the return and the hearing.¹

3523 Number of applications

A relator may make any number of applications for a writ of *habeas corpus*.² In *habeas corpus*, the order is final for the pur-

¹ Sullivan v. People, 224 Ill. 468, 473 (1906).

² People v. McAnally, 221 Ill. 66, 69 (1906).

pose of a writ of error only in the sense that the parties are concluded under the particular circumstances existing when the order was made. If there is any change in the condition and circumstances, the order is not final or conclusive and the parties are free to try the issue again upon a second application.³

In second applications for a *habeas corpus* to secure the custody of children, the former proceeding is *res judicata* so long as the same material conditions exist as did at the time the final order was entered in that proceeding.⁴

GROUND S

3524 Adoption proceeding

Habeas corpus is the appropriate remedy to test the validity of adoption proceedings.⁵

3525 As writ of error or appeal

A writ of *habeas corpus* cannot be used in place of a writ of error or as an appeal.⁶

3526 Second indictment

Habeas corpus is appropriate to effect the release from custody of a person who is detained under a second indictment for the same offense after his discharge has been ordered on account of an unlawful delay in his trial under the first indictment.⁷

3527 Stay of execution

A duly passed sentence is not annulled by ordering stays of execution thereof at the prisoner's request presumably in furtherance of justice.⁸

3528 Trial delay

The custody of the petitioner for more than four terms of the court cannot be made the ground for a discharge upon *habeas corpus* in Illinois.⁹

³ Sullivan v. People, 224 Ill. 474.

⁴ Cormack v. Marshall, 221 Ill. 519, 525 (1904).

⁵ Sullivan v. People, 224 Ill. 477.

⁶ People v. Strassheim, 242 Ill. 359, 362 (1909).

⁷ People v. Heider, 225 Ill. 347, 351 (1907).

⁸ People v. Murphy, 212 Ill. 549 (1904).

⁹ People v. Strassheim, 228 Ill. 581, 588 (1907).

3529 Validity of law

The validity of a law under which an indictment is found and returned, may be determined in a *habeas corpus* proceeding.¹⁰

JURISDICTION

3530 Concurrent

Courts of concurrent jurisdiction have no power to grant writs of *habeas corpus*, when it appears from the petition, the return, or from any other legitimate source that the imprisonment of the petitioner is under a voidable but not a void judgment.¹¹ Thus, the circuit and superior court judges, and any other *nisi prius* judges, have no jurisdiction to entertain *habeas corpus* proceedings in criminal cases which have been affirmed by the supreme court on appeal or error, notwithstanding the fact that the jurisdiction of the circuit and superior court judges in *habeas corpus* matters is concurrent with that of the jurisdiction of the supreme court justices.¹²

In Illinois, on original application for *habeas corpus* the jurisdiction of the supreme court is not greater, nor based on different grounds, than that of the circuit and superior court.¹³

3531 Jurisdictional and discretionary matters

A writ of *habeas corpus* is only authorized in those cases where the court has acted without jurisdiction. Mere errors committed or arising out of matters wherein the court has exercised a discretion during the pendency of the trial and reviewable upon error, are not reviewable upon this writ.¹⁴

3532 Satisfaction of joint judgment

A judgment which had been entered in a *habeas corpus* proceeding cannot be impeached or the subject matter of the suit re-tried in a subsequent similar proceeding, when the first court had jurisdiction of the parties and of the subject matter of the cause. But this does not prevent courts, in a subsequent *habeas corpus* proceeding to hear and determine the question whether

¹⁰ *People v. Strassheim*, 240 Ill. 279, 283 (1909).

¹¹ *People v. Zimmer*, 252 Ill. 9, 24, 25 (1911); Secs. 21, 22, Hurd's Stat. 1909, p. 1232.

¹² *People v. Superior Court*, 234 Ill. 186, 198 (1908).

¹³ *People v. Murphy*, 212 Ill. 584, 590 (1904).

¹⁴ *People v. Murphy*, 212 Ill. 588.

the judgment upon which a writ has been issued had been paid and satisfied subsequent to rendition of the judgment, and if found to have been paid and satisfied, to release and discharge the judgment debtor.¹⁵

A person who had been lawfully imprisoned under a judgment may be discharged from custody upon *habeas corpus*, when the judgment is superseded, annulled or satisfied. The satisfaction of a joint judgment by one joint judgment debtor is a satisfaction by all.¹⁶

PETITION

3533 Requisites

In *habeas corpus*, the petition must be in substantial compliance with the provisions of the statute, and must show upon its face that the petitioner is entitled to his discharge.¹⁷ An averment that a judgment is void is of no force or effect to confer jurisdiction upon the court, if it appears as a matter of law that the averment is untrue.¹⁸

3534 Bail, release on (Fla.)

(Caption)

To the honorable,, etc.

The petition of, a resident and citizen of the state of Florida and county of, respectfully shows unto your honor:

1, That your petitioner is unlawfully, as he apprehends, restrained of his liberty by one as sheriff of county, Florida, who holds your petitioner in custody by virtue of a *capias*, a certified copy of which is hereto attached and marked exhibit "A," and does not hold him by virtue of any other writ or process.

2, Your petitioner further shows unto your honor that at the term of the circuit court for county, Florida, in, he was indicted for unlawfully selling liquor in a county in which the sale of liquor was prohibited by law, and that at the same term of the circuit court aforesaid a *capias* was issued by the clerk of said court, by order of the presiding judge thereof, to cause the arrest of said, your petitioner; but before your petitioner was

¹⁵ Eisen v. Zimmer, 254 Ill. 43, 47 (1912).

¹⁶ Eisen v. Zimmer, 254 Ill. 46; Sec. 22, c. 65, Revised Statute Illinois.

¹⁷ People v. Superior Court, 234 Ill. 198.

¹⁸ People v. Superior Court, 234 Ill. 199.

arrested, the said circuit court adjourned its regular term and was in vacation, and that the said circuit court judge failed to enter upon the back of the said *capias*, so issued by the clerk of said court, the amount of the bond to be taken and approved in the case of your petitioner as is provided for by section 3864 of the General Statutes of the state of Florida.

3, Your petitioner shows unto your honor, that afterwards, to wit, on the day of, 19.., your petitioner was arrested in and returned to county, Florida, by the sheriff of said county and committed to jail in said county, where your petitioner is now confined.

4, Your petitioner represents that as he was not advised of the amount of the bond required for his release from said jail, pending the determination of the case in which he is defendant in court, he made up and tendered to the clerk of the circuit court and to the sheriff of county, Florida, a good and sufficient bond in the sum of dollars, with and as sureties thereon, and that he made the bond in said amount because of the fact that in other similar cases where *capiases* are issued the said judge of the circuit court, or the clerk thereof, took the bond in the sum of dollars and released the defendants; but that upon presenting said bond with the sureties, the aforesaid clerk of the circuit court and the sheriff of said county declined to approve the same and release the said defendant, as evidenced by exhibit "B," hereto attached; and the said bond is hereto made a part of this petition as exhibit "C."

5, Your petitioner represents that under the constitution of the state of Florida, as found in section 9 of the Declaration of Rights, he is entitled to bail, said section providing that all persons should be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. And said offense for which your petitioner is indicted is not a capital offense.

Therefore, your petitioner comes with this petition for a writ of *habeas corpus* because as he apprehends he is illegally withheld from his liberty as aforesaid, and because he has been refused bail for an offense which is in itself bailable, and because no amount of bond has been fixed on the back of the *capias* by the circuit judge, as is provided for in section 3864 of the General Statutes of Florida, and because he has as yet been convicted of no offense known to the laws of Florida.

Wherefore, your petitioner says that he is illegally deprived and restrained of his liberty by, sheriff of county, Florida, and prays that a writ of *habeas corpus*, in due form of law, be issued to said sheriff of county, Florida, returnable to this court or to such court or judge as your honor may designate, to inquire into and deter-

mine the cause of your petitioner being so illegally held in custody; and as in duty bound your petitioner will ever pray, etc.

.....
Attorney for petitioner.

(Venue)

Before me, the subscribed authority, personally came, who being duly sworn says on oath that he is the petitioner making the above and foregoing petition and that the matters and things therein set forth are true, except such as he has been informed as the law, mentioned in said petition, and this he believes to be the law and so alleges as facts.

.....
Petitioner.

Subscribed, etc.

(Mississippi)

(Caption)

To the honorable,, chancellor of the
chancery district:

Your petitioner,, would respectfully show that he is deprived of his liberty by, sheriff of county, in the county jail of said county under a warrant issued by the circuit court clerk of said county on an indictment charging him with

The ground relied on for relief is that he is wholly innocent of said charge.

Premises considered, your petitioner prays that a writ of *habeas corpus* issue in his behalf.

.....
Petitioner.

(Venue)

Personally appeared before me the undersigned clerk of the circuit court,, who after being by me first duly sworn, says that the matters and things set out in the above and foregoing petition for a writ of *habeas corpus* are true and correct as stated.

.....

Sworn and subscribed, etc.

Order

(Caption)

To the clerk of the circuit court of county, Mississippi:

Let a writ of *habeas corpus* issue as prayed for in the foregoing petition returnable before me at the court house in county, on day of, at

o'clocknoon, and let subpoenas issue returnable accordingly.

Witness, etc.

.....
Chancellor.

3535 Child's custody

(Caption)

To the honorable, judge of the circuit court of
..... county, Illinois:

The petition of B, by R, her next friend, respectfully shows unto your honor that B, a girl of years of age, is wrongfully restrained of her liberty and possession of her body held by T and M, his wife, of the city of, county,, and is not detained by virtue of any process, judgment, decree or execution specified in the twenty-first section of the Act on *habeas corpus*, which is chapter 65 of the statutes of the state of Illinois. And your petitioner further avers that said B is the only child of W, late of the city of, county,, who was born in,, and was a subject of Great Britain, who departed this life a subject of Great Britain and Ireland upon the day of, 19., at,, testate, and in and by his last will and testament devised property to the value of not less than (\$.....) dollars to his said daughter B, but did not in and by his last will and testament appoint a guardian of the person of his said daughter, or commit the care and custody of his said daughter to anyone whomsoever, as appears by the last will and testament of said W, a copy of which is attached hereto and made a part hereof as exhibit "A." That the said B is a child years of age and that the mother of B departed this life at the birth of said B years ago, and that the said B has been in the care and custody of said T and M, for whose care and custody the said W paid the said T and M during his lifetime the sum of (\$.....) dollars a month, as your petitioner is informed and believes, and that the said W died leaving neither father nor mother, but sisters, as follows: G, D, your petitioner R, A and F, the aunts respectively of said B, who are her next of kin and are entitled to the care and custody of the person of said B. That said T and M are not related by consanguinity or affinity with the said B and that they are not able to afford the said B the necessary means for support and education in the station of life in which her father, said W, was born and educated, and that the estate left to said B by her said father is insufficient, if invested to the best possible advantage, to support and educate her in her station of life, and that R, the aunt of said B, and her two sisters, G and F, are desirous

of establishing a home where they reside in,, being each of them devisees under their father's will of an income approximately of (\$) dollars a year for each of said five sisters, and each of said sisters has independently of said will (£) pounds a year which will enable them to care for and support the said B according to her station in life. And your petitioner is further informed and believes that her other two aunts, in addition to the said three aunts above mentioned, will aid in the education and support of your petitioner, the said B, provided the care and custody of the said child be committed to said R; and that said B, if committed to said R's care, will naturally be the heir of her said three aunts, who are unmarried and are desirous of contributing to the care and education of their said niece.

Further your petitioner shows that the said T has two children of his own and that the estate left by W to his said daughter, B, is totally insufficient to educate and clothe her as she could be educated and clothed by her aunt, R, in case the custody of your petitioner be awarded to her said aunt.

Further your petitioner alleges that under the last will and testament of said W, J, E, C, and N, all of,, are named as trustees of the estate of said B and have accepted said trust; and have also been appointed executors of said estate and have accepted said trust, and that the said trustees have without authority committed the care and custody of the person of the said B for the time being to said T and M.

Further your petitioner says that her aunt, R, is desirous of educating and caring for, to the best of her means and ability, her said niece, your petitioner, B, and that said R resides at,,, and that it will be for the best interests of your petitioner, the said B, that she be committed to the care and custody of said R.

Wherefore, your petitioner prays a writ of *habeas corpus* to M and T to produce the body of B before judge at the court house,, on,, 19 . . ., at o'clock A. M., to the end that said B may be discharged from the custody of T and M and be delivered to your petitioner's aunt, R.

B.
By
her next friend.

.
Solicitor and of counsel.

(Verification by next friend)

3536 Illegal imprisonment (Ill.)

(Caption in supreme court)

To the honorable court of the state of Illinois.

Your petitioner,, a citizen of the state of Illinois,

and a resident of the city of, in the county of and state of Illinois, complaining unto this honorable court, shows:

1, That at the term, 19.., of the criminal court of county, state of Illinois, a special grand jury, convoked and empaneled by said court in and for the term, 19.., of said court, returned a certain indictment against your petitioner, which indictment was filed in the office of the clerk of the criminal court of county, Illinois, and made a part of the records of said court, and which is in the words and figures following: (Set out indictment and exhibits, if any).

2, That on the day of, 19.., the criminal court of county quashed the second aforesaid count of the aforesaid indictment, and that afterwards on the last day of, 19.., the surety upon your petitioner's bond surrendered him to the sheriff of county, who now holds and detains your petitioner upon a certified copy of said bond; and that he is now detained and imprisoned by the said, sheriff in and for the said county of, under and by virtue of a certified copy of said bond, a copy of which bond is hereto annexed and made a part of this, your petitioner's petition.

3, That said special grand jury found and returned to said criminal court during the month of, 19.., other indictments (besides the aforesaid indictment against your petitioner) against about individuals, all of which indictments were based upon the primary act of, and most of which were based upon section; and that if the same should be tried a great waste of public money would ensue, and the rights and interests of divers persons defendants in said indictments would be jeopardized to no purpose, in the event that this court should hold upon writ of error sued out that the said primary act is unconstitutional, and that all of said prosecutions in consequence thereof are illegal.

4, That the said arrest, detention and imprisonment of your petitioner under and by virtue of said certified copy of said bond is unjust and contrary to law and wholly illegal, for the reason that the said act of the legislature mentioned in the said indictment, that is to say, the act of the legislature entitled, "An act to provide for the holding of primary elections by political parties," approved February 21, 1908, in force July 1, 1908, is repugnant to and in contravention of the constitution of the state of Illinois. As specifications of the unconstitutionality of the said act of the legislature, your petitioner shows to this honorable court, that section of the said act which is quoted in the said indictment herein set out, and is the basis thereof, is unconstitutional and void because (Give specific reasons under headings of a, b, c, etc.).

5, That by reason of the aforesaid matters and things, the said indictment hereinbefore set out is wholly void, and the said *capias* issued, as aforesaid, and based upon the aforesaid indictment, and upon which your petitioner is detained and restrained of his liberty, is wholly void and of no effect; and that therefore the detention and imprisonment of your petitioner is illegal and void.

6, That he is not committed or detained by virtue of any process, judgment, decree or execution issued by any court or judge of the United States in a case where such court or judge has exclusive jurisdiction, nor by virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree, nor for any treason, felony or other crime committed in any other state or territory of the United States, for which he ought by the constitution and laws of the United States to be delivered up to the executive power of such state or territory; but your petitioner says that he is held and detained by virtue of the said *capias*, and not otherwise.

To be relieved from which said detention and imprisonment your petitioner now applies to this honorable court, praying that a writ of *habeas corpus* be directed to the said, sheriff in and for the county of, in the state of Illinois, and may issue in this behalf, pursuant to the statute in such case made and provided, so that your petitioner may be forthwith brought before this honorable court, to do, submit to, and receive what the law may require and direct; and that in the meantime your petitioner may be admitted to bail.

.....

.....
Attorney for petitioner.¹⁹

(Maryland)

In the court.

To the honorable, the judge of the court:

..... prays for a writ of *habeas corpus* to bring up the body of now illegally imprisoned, detained and restrained of liberty by at

.....
.....

Attorney for relator.

Granted, returnable on, the day of, 19.., at o'clock M.

(The relator to notify the state's attorney or his deputy)

¹⁹ Add verification upon information and belief and certified copy of recognizance.

time and cause of such imprisonment and detention, before the supreme court of the state of Illinois immediately after being served with this writ, to be dealt with according to law; and have you then and there this writ, with the return thereon of your doings in the premises.

Witness (chief justice), etc.

(Seal)

.....
Clerk supreme court.

Return

(Caption)

I,, sheriff in and for the county of, state of Illinois, to whom the within writ of *habeas corpus* is directed for return thereto, say that I have the within named in my custody ready to abide the order and direction of this honorable court, and that I have not brought the body of said into court here pursuant to the direction of said writ of *habeas corpus* for the reason that his presence in the court as a return to said writ of *habeas corpus* has been waived by him, the said, as appears by the written waiver by the said by his attorneys hereto attached and made a part of this, your respondent's return to said writ of *habeas corpus*.

And for a further return to said writ I do say, that the cause of the detention of the said is under and by virtue of a certain certified copy of a certain recognizance given in and for the criminal court of county by the said upon an indictment returned and filed in said court against him, charging him, the said, with the crime of That on the day of, one, named in said recognizance as surety for the said, delivered to this respondent, as sheriff of county, the body of the said, together with a certified copy of the aforesaid recognizance upon which he, the said, as surety was then and there holding the body of said, and by virtue whereof he delivered the body of said to this respondent, and this respondent, as a return to said writ of *habeas corpus*, does say that he now holds, detains and imprisons the said under and by virtue of the certified copy of said recognizance, aforesaid, and he herewith attaches as a part of this, his return to said writ of *habeas corpus*, a duly certified copy of said recognizance.

.....
Sheriff in and for the county of,
and state of Illinois, Respondent.

3540 Writ, (Miss.)

State of Mississippi,
To the sheriff or any lawful officer of county in
said state:

We command you to take forthwith and have the body of and, each restrained of his liberty, it is said, by and, before honorable, a judge of our circuit court at, Mississippi, on day of, 19.., at o'clock in the noon, then and there to do and receive what shall then be considered; and do you summons the said and to appear then and there to show cause for detaining the said and; and have you then and there this writ with your proceedings endorsed thereon.

Witness my hand this day of

.....
Chancellor of district
of the state of Mississippi.

Return

Executed by taking possession of the persons of and and bringing them into court, also by summoning personally and by delivering personally to each of them a true copy of this writ and by delivering and before the court as commanded.

This day of, 19..

ANSWER**3541 Child's custody**

(Caption)

These respondents, answering the petition and writ and now making return thereto, do state as follows:

They have in their custody and control the child in question, B, under the authority and by reason of the true cause herein-after set forth; further they state, aver, and allege that the authority and true cause of their having said child in their custody and control is as follows:

This child was born in, county,,; her mother died; her father placed the child under the care and in the custody of these respondents on; they have from that time until the present day thus had her and have devoted to her all the care and solicitude and attention that the best of natural parents could have devoted; the child was very weak and delicate until she was two years old, requiring a great deal of extra attention by night as

well as by day, which they bestowed upon her and by reason thereof became more than usually affectionate toward the child and are now anxious to retain the child by reason of their affection for her, and they say that the child, in turn, regards them, by reason of the premises, with more than the usual affection of a child for its parents.

W, the father of the child, died, 19.., he, during the entire period above indicated, was well pleased with the care that these respondents were giving said child, and paid to them dollars (\$.) per month for the same, at one time a little less and at other times a little more, but averaging dollars (\$.) per month; and said father was paying said sum at the time of his death. These respondents at times expressed their solicitude that he might take the child from then and send it to his sisters, one of whom is the relator herein. In answer to this, he, by word of mouth and also in writings, assured them to the contrary; respondents have at hand his letter of date, which said letter they offer to produce for inspection, and in which he writes, concerning this subject, as follows: "I am very much afraid you are hunting imaginary trouble," and again: "My sisters are of the same opinion they were two years ago; and if anything, the breach is wider now than then between us." (Indicating and meaning that there was some breach or ill-feeling between him and them; so much so as to prevent his ever wanting them to have said child.)

Further, respondents aver, allege and state that under date of, the father wrote them a letter, which they are ready to produce for inspection, in which, referring to the respondent, M, he says, among other things (State substance).

Further, respondents state, aver and allege that the will of said father has been admitted to probate in county,, and therein the following trustees were appointed:,, and said will contains the following provision: (Insert provision).

And further, respondents say that they have been informed and so state, that at the drawing of said will, testator intended to have a clause inserted appointing respondent, M, custodian of the child, but that said clause was by inadvertence omitted, and that testator did orally declare his wish and desire that said M should be custodian of the child after testator's death.

Further, respondents state, aver and allege that said trustees, under date of, 19.., notified these respondents that said trustees had taken action with reference to this subject and had concluded and decided that so far as they had authority so to do, said M should have the care and custody of the child during the pleasure of the trustees and subject to their future action, since which date said conclusion has remained and is still in force and effect, and said trustees have not taken

any further action with regard to the care or custody of said child; and these respondents in turn, at about the same time, expressed to said trustees their willingness to continue the care and custody of the said child upon receiving from the trustees only the net income of the estate in the hands of the trustees; and further, that from said net income, these respondents would clothe the child and all the rest of said income they would accumulate and, upon her coming of age, would give the same to the child; in addition to which these respondents now say that they will keep the child and clothe her and in all regards keep her suitably until she be of age and will do so even if to this court and to the trustees it seems best that they shall have no part whatsoever, either of the income or principal of said estate, that is to say, these respondents now feel that their affection for the child is such, and the affection of the child for them is such, that the financial consideration will be by them ignored altogether for the sake of retaining the child. Further, they say that they are amply able to properly care for the child and provide her with an education and all reasonable necessities, and even articles which are not necessities but suitable for her, and in this regard they invite an examination on the part of the court as also the trustees.

These respondents further answering deny that they are, or that either of them is, wrongfully restraining said child of her liberty or possession of her body; they deny that said W was at the time of his death a subject of; they deny that by his testament he did not commit the care and custody of said child to anyone; they deny that the sisters mentioned in the petition are, or that any one or more of them is, entitled to the care or custody of the person of said child; they deny that the respondents are not able to afford said child the necessary means for support and education in her station in life or in the station occupied by her father; they deny that the sisters of the deceased referred to in the petition herein are, or that any of them is, possessed of the estate or income set forth in the petition; and they deny that the estate left by the father of said child is insufficient to educate and clothe her as she should be.

And now having fully answered, they pray that the writ be quashed, etc.

.....

Respondents.

.....
 Solicitor and of counsel

(Verifications)

JUDGMENT

3542 Bail, denial (Miss.)

(Caption)

This cause coming on to be heard on application of to be granted bail, came the relator in his own proper person and by attorneys; and the court having heard the evidence introduced in behalf of the state, and the motion of the relator for an order directing that the relator be admitted to bail on evidence of the state; and said motion being overruled, and the relator having rested his case without further testimony, it is thereupon ordered that the petition for bail be and the same is hereby denied, and that the relator be remanded to the custody of the sheriff to answer the indictment filed against him in the circuit court of this county. To which action of the judge (or chancellor) in so refusing to grant bail the relator here and now excepts and prays an appeal to the supreme court, which is granted.

Dated, etc.

3543 Bail, release on (Fla.)

(Caption)

Upon reading and considering the petition of it is ordered that the sheriff of county do release from custody upon his making and filing with the clerk of the circuit court of county, a bond in the penal sum of dollars, payable to, governor of the state of Florida, and his successor in office with two good and sufficient sureties to be approved by said, clerk, conditioned that the said will appear at the next term of the circuit court for county to answer to an indictment there pending against him for the illegal sale of liquor, and not depart the same without leave of said court.

Done, etc.

3544 Continuance, practice

No order continuing *habeas corpus* proceedings is necessary in Illinois, as such a proceeding like any other suit, stands continued under the statute from term to term until disposed of.²²

3545 Custody of minor, removal to foreign country

The custody of a child will not be awarded to a person who intends to take the child to a foreign country, unless the best interests of the child clearly require that it should be done.²³

²² Matson v. Swanson, *supra*; Sec. 21, c. 37, Hurd's Stat. 1909, p. 627.

²³ Mahon v. People, 218 Ill. 171, 176 (1905).

3546 Custody of minor, order (Miss.)

(Caption)

This cause coming on to be heard before the honorable judge of judicial district of the state of Mississippi, at, Mississippi, pursuant to a fiat of chancellor of chancery court, district of the state of Mississippi, the said and, appearing in court by counsel, and having filed their answer to the petition of; and the court having read the petition of, and the answer of, and having heard the evidence in the cause and having considered the same, the court hereby orders that the sheriff of county forthwith turn over to the said, petitioner, the custody of said minors and that the said and be taxed with the costs of this proceeding.

Dated, etc.

APPEAL AND ERROR

3547 Illinois, practice

In *habeas corpus* proceedings a writ of error, and not an appeal will lie to review a judgment of the court.²⁴ But neither appeal nor error can be prosecuted from an order denying the petition.²⁵ A *habeas corpus* proceeding for the custody of a child is reviewable in the appellate court upon writ of error.²⁶ The persons who have the custody of a child are proper parties to sue out the writ.²⁷

²⁴ Sullivan v. People, 224 Ill. 473.²⁵ People v. McAnally, 221 Ill. 67.²⁶ Mahon v. People, 218 Ill. 173.²⁷ Mahon v. People, 218 Ill. 174.

CHAPTER LXII

INHERITANCE TAX

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IN GENERAL

3548 Inheritance tax law, origin

The Illinois inheritance tax law is substantially the same as the New York statute of 1885 as amended in 1887 and the law of 1892 on the same subject.¹

Laws and authorities relating to general taxes have no application to inheritance taxes.²

¹ People v. Griffith, 245 Ill. 532, 539 (1910).

² People v. Union Trust Co., 255 Ill. 168, 174 (1912).

3549 Inheritance tax, nature

An inheritance tax is a tax on the right to receive a portion of the estate; it is a tax upon the beneficial interest that anyone receives from an estate, in the nature of an impost tax or a tax upon the right of succession, to be imposed upon the several amounts of the decedent's estate to which the successors thereto are, respectively, entitled. It is not a tax upon the estate.³

3550 Inheritance tax, liability

Inheritance taxes accrue at the time that the estate vests, or upon the death of the decedent.⁴

An executor, administrator or trustee is liable for the payment of an inheritance tax only as to property which is within the state at the testator's death, or which thereafter comes into his possession; and he may retain only the inheritance tax that is due on a particular legacy: he cannot retain the entire sum of the inheritance taxes imposed as a gross amount.⁵

Heirs, legatees and parties interested in an estate cannot by agreement between themselves change the proportionate amounts of the property on which the respective beneficiaries should pay an inheritance tax.⁶

3551 Inventory, court's duty

The county or probate court is in duty bound to order the filing of an inventory of a deceased person's property, if none has been filed and if its attention is called to that fact.⁷

3552 Safety deposit vaults, notice

In every estate that is subject to the payment of an inheritance tax, the state has a vested financial interest at the death of a lessee of a safety deposit box or safe in the property therein deposited, whether the lessee is sole, joint, or a co-partnership; and it is the duty of the lessor to respect and protect that interest, and to notify the proper representative of the state, in all

³ People v. Union Trust Co., 255 Ill. 179; People v. Griffith, 245 Ill. 536, 537; Merrifield's Estate v. People, 212 Ill. 400, 404 (1904).

⁴ People v. Union Trust Co., 255 Ill. 182.

⁵ People v. Union Trust Co., 255 Ill. 180; Secs. 4, 5, Inheritance Tax

law (Hurd's Stat. 1909, pp. 1897, 1899).

⁶ People v. Union Trust Co., 255 Ill. 182.

⁷ People v. Sholem, 244 Ill. 502, 505 (1910); Secs. 51, 87, 88, Administration act.

cases where the property deposited might be subject to an inheritance tax, of the time when the property shall be surrendered and delivered to the personal representative, heir or devisee, to enable the state to determine whether the property is subject to an inheritance tax, and to receive and be paid such a tax.⁸

The placing or depositing of securities and valuables by a lessee in a safety deposit box or vault rented or leased for that purpose is a bailment, and is governed by the law applicable to bailments and by the inheritance tax law.⁹

TAXABLE PROPERTY

3553 Test

The property is not subject to an inheritance tax if the disposition of the property, and its actual possession and enjoyment have taken place before the grantor's death and the transfer, in whatever form, was not made in contemplation of death as the impelling motive.¹⁰

3554 Charitable purposes

A bequest for the construction and maintenance of a monument and drinking fountain in a public place is exempt from taxation under section 21½ of the Inheritance Tax law.¹¹

3555 Dower interest, ante-nuptial contract

A widow's dower interest is subject to an inheritance tax.¹²

The interest acquired in an estate of a deceased person under an ante-nuptial contract is subject to an inheritance tax the same as dower; and in determining this tax, this interest should be treated as dower would be, and must not be considered as an indebtedness to be deducted from the market value of the estate.¹³

⁸ National Safe Deposit Co. v. Stead, 250 Ill. 584 (1911); Sec. 9, Inheritance Tax law 1909.

⁹ National Safe Deposit Co. v. Stead, 250 Ill. 593, 594, 606; Sec. 9, Inheritance Tax law 1909.

¹⁰ People v. Burkhalter, 247 Ill. 602, 604 (1910).

¹¹ In re Graves' Estate, 242 Ill. 23, 27 (1909).

¹² People v. Nelms, 241 Ill. 571, 573 (1909); Billings v. People, 189 Ill. 472, 475, 481 (1901).

¹³ People v. Field, 248 Ill. 147, 150, 153 (1911).

3556 Foreign stocks and bonds

Stocks and bonds of foreign corporations which are held on deposit in Illinois for safe keeping are not subject to an inheritance tax.¹⁴

3557 Gifts, law and fact

All property is subject to an inheritance tax which is conveyed by will or transfer in anticipation of death to take effect by that event, whether there is or there is not a fraudulent intent and regardless of whether the gift is *inter vivos* or *causa mortis*.¹⁵ The donee of a gift is liable to an inheritance tax, although the gift is absolute, if it is made in contemplation of death.¹⁶ A gift made in contemplation of death is subject to an inheritance tax, although the gift is consummated before death; but whether a gift was made in expectation of death and whether the donor intended that the gift should be enjoyed up to his death, are questions of fact.¹⁷

3558 Personal property beyond state

Personal property situated in another state is subject to an inheritance tax at the decedent's or testator's domicile.¹⁸

3559 Remainders, bond

Estates in remainder are liable to an inheritance tax as of the date of the testator's death.¹⁹ This tax is not payable until the remainder-man takes actual possession of the estate if he gives a bond that he will pay the tax at that time.²⁰

3560 Trust estate

An estate bequeathed to the lineal descendants of the testator is taxable immediately upon his death or within a reasonable time thereafter, although the estate is subject to a trust for a certain period of years and is to be divided at the end of such period to the descendants.²¹

¹⁴ *People v. Griffith*, 245 Ill. 532, 542 (1910); Sec. 1, Inheritance Tax law (Hurd's Stat. 1909, p. 1897).

¹⁵ *Rosenthal v. People*, 211 Ill. 306, 308 (1904).

¹⁶ *Merrifield's Estate v. People*, 212 Ill. 405.

¹⁷ *In re Benton's Estate*, 234 Ill. 366, 370 (1908).

¹⁸ *People v. Union Trust Co.*, 255 Ill. 175.

¹⁹ *Ayers v. Chicago Title & Trust Co.*, 187 Ill. 42, 54 (1900).

²⁰ *People v. Nelms*, 241 Ill. 574.

²¹ *In re Kingman's Estate*, 220 Ill. 563 (1906).

PETITION

3561 Form (Ill.)

State of Illinois, }
 county. } ss.

In the county court of county.

In the matter of the estate of }
 }
 Deceased. } Inheritance tax
 Docket No.

To the honorable, judge of said court.

The petition of and respectfully shows:

1, That your petitioner,, is the attorney general of the state of Illinois, and your petitioner,, is the state's attorney in and for county, Illinois, and that they prosecute here for and on behalf of the people of the state of Illinois.

2, That on or about the day of, 19.., at the county of, died and was at the time of his death a resident of county of, state of Illinois.

3, That said deceased left a last will and testament dated, which was duly admitted to probate, in the probate court of county, on the day of, 19..; that and were, by said court, appointed executors of said will; that they duly qualified as such; and that said appointment is still in force.

4, That said decedent died seized and possessed of property within this state or subject to its laws, valued at about the sum of dollars.

5, That upon the death of the said, certain property of said decedent thereupon passed to, (widow), and, his children.

6, That none of the persons designated in the foregoing paragraph, number five, of this petition is a person or corporation exempt by law from taxation.

7, That the property so passing, or some part thereof, is subject to taxation under an act entitled, "An act to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same," approved June 15, 1905, and in force July 1, 1905, and all amendments thereto.

8, That said tax is now due and unpaid and the parties liable therefor are neglecting to pay the same as is required of them by law.

Wherefore, your petitioners pray that a citation issue herein to, citing them to appear before this court on the day of next term thereof to be held in the court house in, on the day of, 19.., and show cause why the tax under the act

aforsaid should not be paid and said property be appraised if necessary for that purpose.

.....
Attorney General.

.....
State's attorney for
county, Illinois.

(Verification by state's attorney)

DEFENSES

3562 Foreign judgment

The finding that all taxes, including inheritance taxes, have been paid, is no bar to the imposition of an inheritance tax by a foreign jurisdiction, under a provision of a statute which requires the administrator or the executor to retain a sufficient amount with which to pay an inheritance tax; for such a statute does not include an inheritance tax which may be imposed by a foreign state against a portion of the estate or against the person entitled thereto, and under such a provision, a court has no power to appropriate the share of an heir or of a devisee to the payment of an inheritance tax that is assessable under foreign laws.²²

APPRAISEMENT

3563 Appointment of appraisers (Ill.)

(Caption)

Now on this day of, 19.., it being the day of said term of this court, come the people of the state of Illinois, by, attorney general, and, state's attorney in and for said county of, and the defendants,, also come by and, their attorneys; and it appearing to the court that the above named defendants and each of them have been personally served with the process of this court, also, by the sheriff of said county, more than ten days prior to the first day of the present term of this court, and that the defendants also have entered their appearance in this cause either in person or by counsel, and the executors of said estate, and, having filed their petition also asking that said estate be appraised, and having had due notice of these proceedings, and the court having heard both petitions heretofore filed and the arguments in relation thereto, and being fully advised in the premises doth find: that departed this life intestate on the day of, 19.., leaving as his sole heirs and beneficiaries,

²² People v. Union Trust Co., 255 Ill. 176, 179.

his widow, and , his sons, and and , his daughters, and leaving an estate consisting of real and personal estate of the estimated value of dollars, and that said estate and the said heirs thereof may be liable and are liable to pay an inheritance or succession tax under the laws of the state of Illinois.

It is hereby ordered, that , of the city of , in said county, be and he is hereby appointed appraiser herein for the purpose of fixing the fair market value of the property of which , late of the county of , Illinois, died seized and possessed, subject to the payment of said tax, and that said appraiser, before entering upon the duties of his office, take and file an oath with the clerk of said court to faithfully and fairly perform the duties of such appraiser according to law, and to make a just and true report of his proceedings according to the best of his understanding.

It is further ordered that said appraiser give ten days' notice in writing, by mail postpaid, of the time and place he will proceed to appraise such property, to all persons known to have or claiming an interest in said property, and that thereupon at such time and place, or at the time and place to which he may adjourn such proceeding, such appraiser shall examine, ascertain and report the facts as to the relationship to said decedent of all persons having or claiming to have an interest in said estate, as to the debts claimed or shown to exist and claims filed or allowed against said estate, together with the costs, expenses and commissions of administering the same, as near as may be, and also all other facts and matters material to fix the clear cash value of all estates, annuities, life estates and terms for years growing out of said estate, and to report the value and amount thereof, and at what rate the same appears to be taxable under said laws.

And it is further ordered, that for the purpose of such appraisal, said appraiser is hereby authorized to issue subpoenas for and to compel the attendance of witnesses before him, and to take the evidence of such witnesses under oath concerning such property and the value thereof.

And it is further ordered, that said appraiser proceed with all convenient speed to make a report in writing of such value and of his proceedings under this order to the county judge of said county of , together with the depositions of the several witnesses examined by him.

And it is further ordered, that said appraiser file therewith a statement, under oath, showing the number of days actually and necessarily spent in making such appraisal, and his actual and necessary traveling expenses, together with the fees of said witnesses.

.....
County Judge.

3564 Notice

(Caption)

To, attorney for said estate, and to
attorney for

You are hereby notified that on the day of, 19.., at o'clock in thenoon of said day, at room, street, in the city of, Illinois, I will proceed to appraise and fix the value of the estate of said decedent, under and pursuant to the statutes of the state of Illinois, relating to the taxation of gifts, legacies and inheritances in certain cases, at which time and place you may appear if you see fit.

Dated, etc.

.....
Appraiser.

3565 Proof of service

(Caption)

....., being duly sworn, doth depose and say that he is the same person who was heretofore appointed appraiser in the above entitled estate by the county court of county, Illinois; that on the day of, 19.., he duly gave notice by mail, postpaid, to, of county, Illinois, the same being the only persons known to have or to claim an interest in the property which the decedent died seized and possessed of, which is subject to taxation, that he would, as such appraiser, on the day of, 19.., at o'clock in thenoon of that day, at rooms, street, in the city of, proceed to appraise and fix the value of the property which said decedent died seized and possessed of, and which is subject to taxation under and pursuant to the statutes of the state of Illinois relating to the taxation of gifts, legacies and inheritances in certain cases.

Subscribed, etc.

.....

3566 Report (Ill.)

(Caption)

To the honorable, county judge.

I, the undersigned, who was on the day of, 19.., appointed appraiser under and pursuant to the statutes of the state of Illinois relating to the taxation of gifts, legacies and inheritances in certain cases, approved June 15, 1895, in force July 1, 1895, to fix the fair market value of the property of the estate of said deceased, subject to taxation under said act, respectfully report as follows:

1, Forthwith after said appointment, I gave notice by mail to all persons known to have or to claim an interest in the property of said decedent subject to assessment, and to such persons as the county judge by order directed, of the time and place at which I would appraise the property. Service of said notice is evidenced by an affidavit marked exhibit "A" hereto attached and made a part hereof.

2, At the time and place in said notice stated, to wit, at rooms . . . , . . . street, in the city of . . . , Illinois, at the hour of . . . M., on the . . . day of . . . , 19.., the executors of said estate appeared by . . . , their attorney, and . . . appeared by . . . , her attorney, and it being made to appear to the appraiser that large claims against said estate were then pending and undisposed of in the probate court of . . . county, which, if allowed, would wipe out the assets of said estate, the further appraisement of said estate was, on application of and by agreement of the parties, and by order of the appraiser, continued and postponed from time to time, pursuant to adjournments regularly had, until said claims so pending in the probate court should be disposed of in that court.

3, Thereafter, it appearing to the appraiser that the aforesaid claims had been disposed of in the probate court, being there disallowed, on, to wit, . . . , 19.., the appraiser again gave notice by mail to all persons known to have or to claim an interest in the property subject to assessment, and also served notice in writing upon the said attorneys for the executors and for . . . of the time and place he would proceed to appraise the property of said estate. Service of said notices is evidenced by an affidavit marked exhibit "A, No. . . .," and by notice served on attorneys with acknowledgment of service, marked exhibit "A, No. . . .," both hereto attached, and made a part hereof.

4, At the time and place in said notice stated, to wit, at room . . . , . . . street, in the city of . . . , at the hour of . . . , . M., on the . . . day of . . . , 19.., and thereafter from time to time pursuant to adjournments regularly had, I proceeded to appraise all such property of the estate of said deceased subject to taxation under said act, and to take evidence in writing under oath of the several witnesses produced, concerning said property and the fair market value thereof at the time of the death of said decedent; which depositions so far as the same were taken, are hereto attached and made a part of this report, together with certain documentary evidence produced, marked exhibit "B."

5, That on, to wit, . . . , 19.., pursuant to a motion that day entered by the inheritance tax attorney, notice of such appraisement was sent by mail to . . . , notifying him of the hearing thereon to be had on the . . . ,

19.., at o'clock .. M., at room, in the city of, county, Illinois; that at the time and place fixed in said notice, the said appeared by attorney, specially, and objected to the jurisdiction. (Proceed with the special findings of fact and conclusions of law as in a master's report)

And from said appraisement and evidence I find that said decedent,, died seized of property subject to said inheritance tax and that the fair market value of such property of said estate at the time of said decedent's death, and of the several estates, legacies and interests growing out of said estate and passing by reason of the death of said decedent, and the persons entitled therein as heirs, legatees, devisees, etc., to be as follows:

Schedule 1

Estate of, deceased.

Date of decedent's death
 Residence of decedent
 Property transferred by will
 Record of will, book,page.
 Date of letters

Names, titles and addresses of legal representatives, etc.

Executors
 (Names and addresses)

Heirs at law
 (Names and addresses)

Legatees
 (Names and addresses)

Names of persons appearing at appraisement in behalf of estate (State names).

Schedule 2

Inventory of decedent's estate

| Property | Items | Fair Market Value |
|---|-------|-------------------|
| Personal Property | | |
| Personal effect as per appraisement.. | \$ | \$ |
| Cash in bank | | |
| (Enumerate other items in similar manner) | | |
| Notes | | |
| One note of, for \$....., | | |
| dated, due, | | |
| with interest at% per annum | | |
| from date. No interest paid..... | | |
| Real Estate | | |
| (Give legal description and state character of improvement) | | |

Summary

Total personal property
 Deductions—Debts not secured on real estate
 Court costs
 Executor's or administrator's fees
 Attorney's fees
 Total costs of administration
 Total deductions from personal property
 Net personal property
 Total real estate
 Incumbrances on real estate
 Excess of debts over value of personalty
 Total deductions from real estate
 Net value of real estate
 Clear fair market value of decedent's estate

Schedule 3

Taxable estates and interests growing out of the estate of
, deceased.

| Estates, beneficiaries, relationship and description of property | Appraised fair market value | Statutory exemption | Rate | Taxable cash value |
|---|--------------------------------|------------------------|------|-----------------------|
| 1, (Name) Nephew of decedent. Specific cash legacy | \$ | \$ | \$ | \$ |
| 2, for the use and benefit of, granddaughter of decedent. Ante mortem gift by decedent of shares of the capital stock of company, made in contemplation of death. | | | | |

The foregoing, including the several schedules herein, together with exhibits "A" and "B" and transcript of testimony hereto attached, constitute a full and correct report of said

appraisement as made by me pursuant to said order of appraisement.

Respectfully submitted this day of, 19..

Appraiser.

(Venue)

....., being duly sworn, says that the foregoing report by him subscribed is a true and correct report of the appraisement made by him in the matter of said estate, and that he has faithfully and fairly performed the duties of such appraiser, according to the best of his understanding.

Subscribed, etc.

Notice

(Caption)

To

Each of you are hereby notified that my report as appraiser in the matter of the appraisement of the estate of, deceased, is ready and will be and remain in the Inheritance Tax Office, in the city of, subject to your inspection and examination, for a period of days from the date hereof.

Appraiser.

Proof of mailing

(Caption)

I hereby certify that a notice, of which the foregoing is a true copy was, on the day of the date thereof, duly sent by mail to each of the attorneys to whom the same is directed, by enclosing the same in an envelope stamped and addressed, one to each of said attorneys, and thereupon deposited in the post office at the city of

Appraiser.

JUDGMENT

3567 Rights, determination of

An inheritance tax being upon the right of succession and not upon the estate transmitted, it attaches at the time of the decedent's death, and all questions are determined as of that date.²³

²³ In re Graves' Estate, 242 Ill. 212, 216 (1909).

3568 Amount

The inheritance tax must be placed on the appraised fair market value of all the property left by the decedent less the decedent's indebtedness and the expenses of administration. The *bona fide*, or otherwise, expenses incurred by the different claimants of an estate in contesting or compromising their claims are not legitimate expenses of administration.²⁴ In fixing the inheritance tax upon a child's beneficial interest in real estate, the tax should be placed upon the amount remaining after deducting the cash value of the widow's dower.²⁵ The court must take the highest amount that in any contingency would become liable to the tax, in determining the amount of the inheritance tax.²⁶

3569 Refunding erroneous portion of tax

After the time has expired for the county treasurer to turn over to the state treasurer moneys collected as taxes, the county court has no power to order the county treasurer to refund moneys erroneously paid to him as part of an inheritance tax.²⁷

3570 Forms (Ill.)

(Caption)

Upon the report of, the appraiser heretofore duly appointed to appraise the value of the property of the estate of said decedent subject to taxation, under and pursuant to the statutes of this state relating to the taxation of gifts, legacies and inheritances, this day presented and read, it appearing that said decedent,, died on the . . . day of, 19.., seized of property subject to taxation pursuant to said statutes, and that due notice of the time and place of said appraisement was duly given to all persons known to have or to claim any interest in said property and to such persons as were by order of the county judge directed; and it further appearing that the said appraiser, has appraised the said property of said estate at its fair market value; it is therefore ordered, that the said report of appraisement be and the same is hereby approved, and that the said report together with the depositions of witnesses and exhibits in said estate taken

²⁴ In re Graves' Estate, *supra*.

²⁵ People v. Nelms, 241 Ill. 573, 574.

²⁶ People v. Byrd, 253 Ill. 223, 229 (1912).

²⁷ People v. Griffith, 245 Ill. 543; Sec. 10, Inheritance Tax law (Hurd's Stat. 1909, p. 1900).

and returned herein be forthwith filed in the office of the clerk of the county court of county; and,

It is further ordered, upon said report that the cash value of the several estates, annuities and life estates or terms of years growing out of the said estate of, deceased, subject to taxation under said statutes and the tax to which the same are severally liable be and the same are hereby assessed and fixed as follows:

| Beneficiary, relationship and description of property | Appraised value | Exemptions | Cash value of estate | Tax |
|---|-----------------|------------|----------------------|-----|
| | | | | |
| | | | | |
| | | | | |

It is further ordered, that the appraisement returned by the appraiser in his said report, together with the cash value of the several estates, annuities, life estates and terms of years and other property, growing out of said estate of, deceased, and the tax thereon as assessed and fixed herein be entered in the public inheritance tax record of this county.

.....
County Judge.

b

(Caption)

Now on this day of, 19..., this cause again coming on to be heard upon the report of, the appraiser heretofore appointed by this court to appraise the value of the property of the estate of the said, deceased, subject to taxation under and pursuant to the statutes of this state, relating to the taxing of gifts, legacies and inheritances, this day presented and read, together with the evidence and exhibits attached and presented with said report, filed by said appraiser; and the county judge having examined and read the same and being fully advised in the premises, doth find that the said died on the day of, 19..., seized of property subject to taxation pursuant to said statutes and that he died testate, and left him surviving as his only heirs at law and legatees whose portion of said estate is liable to pay any tax,, widow, and, his sons, and and, his daughters, said persons being his only surviving heirs at law and legatees under his said will; that due notice of the time and place of said hearing was duly given to all persons known to have or to claim any interest in said property and to such persons as

were by the order of this court directed; and that the said , appraiser, has in all things proceeded in accordance with the law and has appraised the property of said estate at its fair market value.

It is therefore ordered that the said report of appraisement be and the same is hereby approved and that the said report together with the depositions of witnesses and exhibits in said estate, taken and returned herein, be forthwith filed in the office of the county clerk of this county.

It is further ordered, upon said report, that the cash value of the several estates, annuities and life estates or terms of years growing out of said estate of the said , deceased, subject to taxation under said statutes, and the tax to which the same are severally liable, be and the same are hereby assessed and fixed as follows:

| | |
|--|---------|
| Total value of 1-3 of real estate..... | \$_____ |
| Total value of personal estate..... | _____ |
| Total debts and cost of administration to be deducted | \$_____ |
| Net value of estate | _____ |
|, widow's share as per will.. | _____ |
|, widow's dower and home- stead | _____ |
| Total value of her share..... | _____ |
| Less her exemption..... | _____ |
| Net amount subject to tax..... | _____ |
| Amount of tax..... | _____ |
| share of estate as per will.. | _____ |
| One-half of remainder, | _____ |
| Less exemption | _____ |
| Net amount subject to tax..... | _____ |
| Amount of tax | _____ |
| Total amount of tax..... | _____ |

It is further ordered that the following items of expense be and are hereby fixed as follows, to wit: (Enumerate them).

| | |
|---------------------------|---------|
| Total | \$_____ |
| Total amount of tax | \$_____ |

Each and all of which amounts are hereby fixed by the court as the reasonable costs, charges and expenses in this behalf.

It is further ordered that the executors of said estate shall pay said taxes within twenty days from this date with per cent interest from , 19.. and take credit on their account for the same. Whereupon, the people by , attorney general, and , state's attorney, excepted to the order of the county judge as such, herein, and pray an appeal to the county court, which said appeal is hereby granted without bond.

.....
County Judge.

APPEAL TO COUNTY COURT

3571 Right to appeal

The people as well as those who are interested in the estate may appeal from the county judge to the county court from an order of the county judge approving the appraiser's report and assessing and fixing the cash value of an estate and an inheritance tax on the same.²⁸

3572 Petition for appeal (Ill.)

(Caption)

To the honorable,, judge of the county court of
..... county, state of Illinois:

Now comes by, her next friend, and
....., trustee for, and pray an appeal to the
county court of county, state of Illinois, from the
order entered by the honorable, county judge in
and for said county on the day of, 19...,
imposing an inheritance tax of dollars against said
....., trustee for Said appellants assign the
following reason for this appeal, to wit:

The said property transferred by the said to
the said as trustee for, which is made
the basis of the said tax imposed by said appraiser and said
county judge, was not transferred by the said by
deed, grant, sale or gift made in contemplation of the death
of the said grantor or intended to take effect in possession or
enjoyment after such death, but said property was transferred
absolutely by said in his lifetime to said
in trust for said, such transfer or grant to take
effect in possession and enjoyment immediately and not after
the death of said, grantor, and such transfer or
grant was not made in contemplation of the death of said
grantor, and the said transfer is not subject to an inheritance
tax under the laws of the state of Illinois.

Wherefore, these appellants do except to the said order and
pray an appeal therefrom to the county court of
county, state of Illinois.

.....
Petitioner.

Appeal allowed in accordance with the prayer of the fore-
going petition on this day of, 19..

.....
County Judge.

²⁸ People v. Sholem, 238 Ill. 203
(1909).

b

(Caption)

To the honorable, judge of said court:

Your petitioner,, attorney general of the state of, states that, a resident of county, died on the day of, seized of certain property subject to taxation pursuant to the statute of the state of Illinois, and known as an act to tax gifts, legacies and inheritances in certain cases, and providing for the collection of the same; that the county judge of said county court of county,, did, to wit, on the day of, 19.., appoint appraiser to appraise the property of which the said decedent died seized; that the said thereafter, to wit, on the day of, 19.., did present a report showing the clear fair market value of said estate to be (\$.....) dollars; that on the day of, 19.., said county judge did forthwith fix the then cash value of all estates, annuities and life estates or for terms for years or other beneficiary interests growing out of said estate and the tax to which the same was liable.

Your petitioner further says that he, as the representative of the state of Illinois, is dissatisfied with the appraisement and assessment so made as aforesaid, inasmuch as the said county judge has found that part of said beneficiary interests is not taxable at the present time, that the deed of trust made by said decedent bearing date the day of, 19.., to the, was not executed by the said decedent in contemplation of his death, and that except as to the portion of the premises conveyed thereby, necessary to produce an annual income of (\$.....) dollars, said deed of trust was not intended to take effect in possession and enjoyment after the death of said decedent, but on the contrary went into effect and enjoyment at or shortly after the date of its execution and prior to the death of said decedent; and for other good and sufficient reasons.

Your petitioner therefore respectfully prays an appeal from the said county judge of the county court of county, in accordance with the provisions of said act.

.....
Attorney General of the
state of Illinois.

3573 Order

(Caption)

It appearing from the petition filed and presented by the attorney general,, in the above entitled cause that,, a resident of county,, died on the day of, 19.., possessed of prop-

erty taxable under an act to tax gifts, legacies and inheritances in certain cases and providing for the collection of the same, in force, and the amendments thereto, and that an appraiser was appointed to appraise the value of said property, and that the county judge of the county court of said county did thereafter fix the cash value of all estates, annuities, life estates or terms for years and estates in remainder growing out of said estate and the tax to which they were liable; and it also appearing that the said attorney general was dissatisfied with said appraisement and assessment and has prayed an appeal therefrom to the county court of county, Illinois; it is therefore ordered that said appeal be and the same is hereby approved and allowed in accordance with the statutes in such cases made and provided, without cost to the state.

.....
Judge of the county court of county.

b

(Caption)

Now on this day comes the petitioner herein and prays an appeal from the ruling of the county judge in this matter to the county court of this county, which prayer for appeal is allowed upon said petitioner filing herein an appeal bond in the penal sum of dollars, with sureties thereon to be approved by the court; which bond is approved by the court and ordered filed.

3574 Bond

²⁹ The condition of the above obligation is such, that whereas by order of, as county judge in and for the county of and state of Illinois, entered on the day of, 19.., an inheritance tax of dollars was imposed upon the said as trustee for, in the matter of the estate of, deceased, inheritance tax numbered of the said county court of county, from which order the said, by her next friend and the said, as trustee aforesaid, have taken an appeal to the county court of county:

Now, therefore, if the said as trustee aforesaid, and the said shall duly prosecute their said appeal with effect, and moreover pay the amount of the judgment, costs, taxes, interest and damages rendered and to be rendered against the said as trustee for, in case the said order shall be affirmed in said county court of

²⁹ Precede this by obligation to the people of the state of Illinois.

..... county, then the above obligation to be void; otherwise to remain in full force and virtue.

(Signatures and seals)

Approved, etc.

3573 Appearance

State of Illinois, }
..... county. } ss.

In the county court of county.

In the matter of the estate of }
..... } Inheritance tax appeal
Deceased. } Number

I hereby enter the appearance of as attorney general for the state of Illinois, on behalf of the people, etc., and my own appearance as inheritance tax attorney for the county of and state of Illinois, in the above entitled cause.

3576 Trial, nature

Upon appeal of an inheritance tax matter to the county court, the trial is *de novo*.³⁰

3577 Judgment

(Caption)

This cause being called for trial, come now the appellants,, trustee for by, their attorneys, and, inheritance tax attorney for the county aforesaid, and; and the court after hearing all the evidence produced and being fully advised in the premise, finds that the gift of thousand shares of the capital stock of the, a corporation, made by to as trustee for, was a gift made in contemplation of death within the meaning of the statute, and that said gift is subject to an inheritance tax of dollars; and thereupon, it is ordered by the court that said, as trustee for said, pay said tax of dollars and interest thereon at the rate of per cent per annum from, 19.., the date of the death of said, up to the date of payment, and that the order of the county judge, dated, 19.., imposing said tax be and the same is hereby affirmed.

To the entry of which order and each and every part thereof, the said trustee for excepts and prays an appeal

³⁰ People v. Mills, 247 Ill. 620, 621 (1910).

from the judgment of this court to the court of the state of Illinois, which appeal is allowed upon his filing herein his appeal bond in the penal sum of dollars to be approved by the court within days from this date, together with his bill of exceptions within days from this date.

Enter
Judge.

b

(Caption)

And now on this day, this matter coming on to be heard upon the appeal taken herein from the order of the county judge, fixing the amount of tax due from said estate under and pursuant to the statutes of this state relating to the taxation of gifts, legacies and inheritances, and upon the report of the appraiser appointed by said county judge to appraise said estate at its fair market value at the time of the death of the said, and the said having appraised the estate of the at its fair market value at the time of his death, and upon whose report said order was entered, and upon testimony taken and heard in open court.

And the court having heard the argument of counsel, and being fully advised in the premises, doth find that said decedent,, died on the day of, 19.., seized of property subject to taxation pursuant to said statutes, and that all persons known to have, or to claim any interest in said property have been duly notified of this proceeding.

The court further finds that on or about the day of, 19.., the said decedent,, and, his wife, signed, executed and delivered a certain deed of trust, wherein and whereby said decedent conveyed to the, a corporation, as trustee, the following described real estate situated in the city of, county of, state of Illinois, to wit: (Describe property) lying and being at the corner of the intersection of and in said city, and otherwise known as numbers to both inclusive, to have and to hold the same, together with the improvements thereon, in trust upon the conditions and for the uses and purposes in said deed of trust set forth.

That in and by said trust deed it was, among other things, provided that said trustee shall take charge of, manage, operate, and control the premises therein described, and out of the rents, issues, and profits therefrom pay all taxes and expenses of operation and maintenance; that said trustee should distribute the net rents, issues, and profits arising therefrom, in equal shares to and, sons of said decedent, during their joint lives, and upon and after the death of either of the

said or the said, should pay in like manner to the widow, if any, of said deceased son his proportion of said income until her death, or remarriage, or until the end of (.....) years after the death of the survivor of said sons, and, upon the death of either of said sons leaving no widow surviving him or leaving a widow, then, upon her death or remarriage, within the period of years, his proportion of said income should be paid to his heirs at law until the termination of said trust.

That it was also, among other things, in said deed of trust provided that said trustee should, at all times during the joint lives of said and, his wife, and during the life of the survivor, notwithstanding the provisions hereinabove referred to, save and reserve until the end of each calendar year, out of said rents, issues, and profits, a sum equal to (\$.....) dollars per month, or (\$.....) dollars per year; and if, at or before the end of any calendar year during the existence of said trust, and during the joint lives of said grantors or the life of the survivor of them, they, the said or, or either of them, should request the trustee to pay said sum over to him or her, said trustee should so pay the sum, and the shares of the other beneficiaries of said trust should be abated proportionately.

That it was also provided in said deed of trust that the trust therein created should terminate:

First, Upon the death of the survivor of said and, if neither leave surviving him a widow or descendants.

Second, When, after the death of both of said and, and within years thereafter, there should be in being no lineal descendants of either of them, and no widow of either of them not remarried.

Third, Or in any event, at the expiration of years after the death of the survivor of said and; and that upon such termination of said trust, said trustee should convey said premises, discharged of all trusts, in the following manner and to the following named persons, to wit:

1, If, at the time of such conveyance, there should be living and not remarried widows and descendants of both of said and, then to the widow of each an undivided (.....), and to the children or descendants of each an undivided (.....), as tenants in common.

2, If, at said time, widows of both said and should be living and not remarried, and no children or descendants of either should then be living, then to each of said widows an undivided (.....).

3, If, at said time, no widow of either shall be living and unmarried, then to the heirs at law of each an undivided (.....) as tenants in common.

4, If, at said time, there should be living and not remarried the widow of one thereof only, and also a child, children, or descendants of the deceased husband of such widow, then to such widow (.....) and to such child or children, or descendants (.....), as tenants in common, and to the heirs at law of the other the remaining (.....) as tenants in common.

5, If, at such time, there be living and not remarried the widow of one only, and no children or descendants of her deceased husband, then to such widow an undivided (.....) of said estate, and to the heirs at law of the other the remaining (.....) thereof, as tenants in common.

The court further finds that said deed of trust was, after the execution thereof, and after the death of said , and on the day of , filed for record in the recorder's office of county, and recorded in book of records on page , as document number , and that the fair market value of the premises conveyed by said trust deed at the time of the execution thereof, and at the time of the decedent's death, was (\$.....) dollars; that immediately upon the execution of said deed of trust, the said trustee entered into and took possession of said premises, and was at the time of the decedent's death, and is at the present time, collecting the income therefrom and disbursing the same in accordance with the terms of said deed of trust, including the payment of said per year to the said

The court further finds that the said deed of trust was not executed by the said decedent in contemplation of his death and that the said deed of trust, as to that portion of the premises conveyed thereby necessary to produce the annual income of dollars, was intended to take effect in possession or enjoyment after the death of said decedent, and as to the remainder of the premises conveyed thereby, the said deed of trust was not intended to take effect in possession or enjoyment after the death of said decedent, but on the contrary went into effect and enjoyment at or shortly after the time of its execution, and prior to the death of said decedent; that the conveyance by said deed of trust of that part of said premises necessary to produce the said annual income of dollars was intended to take effect in possession and enjoyment on the part of the beneficiaries therein named after the death of said decedent; and that portion of the premises conveyed by said deed of trust necessary to produce an annual income of dollars bears the same proportion to the entire value of said premises that the sum of dollars bears to the entire annual net income therefrom.

And the court finds that the fair market value of said portion,

so determined and based upon the stipulation of parties hereto with reference thereto, is the sum of (\$.....) dollars; that the beneficial interest of the said in such portion of said premises as did not take effect in possession or enjoyment until after the death of said decedent, and valued as above at (\$.....) dollars, was, at the time of the death of said decedent, equal to the present value of an annuity of dollars during the remainder of her life, which the court finds to be the sum of (\$.....) dollars and cents, and which amount, for the purpose of taxation as aforesaid, should be added to the value of her beneficial interest derived by and under the last will and testament of said decedent; that the beneficial interest of the said in the said portion was, at the time of the death of said decedent, equal to the present value of an annuity for the remainder of his life of of said dollars, or the sum of dollars, subject to the prior right of the said therein, together with the present value of an annuity for his life of the remaining of said dollars, or the sum of dollars, subject to the prior rights of the said and therein, as aforesaid; that the beneficial interest of the said in said portion was, at the time of the death of said decedent, equal to the present value of an annuity for the remainder of his life of of said dollars, or the sum of dollars, subject to the prior right of the said therein, together with the present value of an annuity for his life of the remaining sum of dollars, subject to the prior rights of the said and therein, as aforesaid; that, based upon the expectancy of life of the said and, and upon the tables for computing present value of life estates and annuities subject to prior life estates, the present value of the interest of the said, so passing in possession and enjoyment after the death of said decedent, was at the date of the death of said decedent the sum of (\$.....) dollars, and the present value of the interest of the said as aforesaid, at the time of the death of the said decedent, was the sum of (\$.....) dollars and cents; that each of the interests of the said and, being less in amount than their respective statutory exemptions, are therefore subject to no tax.

It is therefore ordered and adjudged by the court that the cash value of the several estates or terms of years growing out of the said estate of said, subject to taxation under said statutes, and the tax to which the same are severally liable be, and the same are hereby assessed and fixed as follows:

| Beneficiary, Relationship and Description of Property | Appraised Value | Exemption | Cash Value | Tax |
|---|-----------------|-----------|------------|-----|
|, widow and sole devisee under the last will and testament of decedent, years of age at date of his death. | | | | |
| Entire estate devised by will.. | 00 | | | |
| Annuity for life of under terms of deed of trust which did not vest in possession or enjoyment until after decedent's death | 00 | | | |
| Present value | 00 | 00 | 00 | 00 |
|, son, annuity for life of subject to life estate therein of, also annuity for life of, subject to life estates therein of and under terms of deed of trust and which did not vest in possession or enjoyment until after decedent's death | 00 | 00 | 00 | 00 |
| Present value | 00 | 00 | 00 | 00 |
|, son, annuity for life of subject to life estate therein of, also annuity for life of subject to life estates therein of and under terms of deed of trust and which did not vest in possession or enjoyment until after decedent's death | 00 | 00 | 00 | 00 |
| Present value | 00 | 00 | 00 | 00 |

It is further ordered that the appraisement returned by the said appraiser, and his said report, together with the cash value of the estates, annuities, life estates, and terms for years, and other property growing out of said estates, and the tax thereon, as assessed and fixed therein, be entered in the public inheritance tax records of this county.

And thereupon the people of the state of Illinois, prayed an appeal from the order and decree of the county court of county, herein to the supreme court of the state of Illinois, which appeal was granted upon said people of the state of Illinois, filing their bill of exceptions within days from the date of the entry of this order.

Dated, etc.

.....
County Judge.

3578 Bond (Ill.)

³¹ The condition of the above obligation issued is such that whereas by an order of the county court of county, entered on the day of, 19.., an inheritance tax of dollars, with interest thereon at per cent per annum from, 19.., was imposed upon the said as trustee for in the matter of the estate of, deceased, inheritance tax appeal number in said county court of county, and the said as trustee aforesaid, has prayed for and obtained an appeal from said order and judgment of said county court to the supreme court of the state of Illinois.

Now, therefore, if the said, as trustee aforesaid, shall duly prosecute his said appeal with effect, and moreover pay the amount of the judgment, costs, interest and damages rendered and to be rendered against him in case the said judgment shall be affirmed in said supreme court, then the above obligation to be void; otherwise to remain in full force and effect.

(Signatures and seals).

3579 Bill of exceptions, necessity

The admission of evidence and the sufficiency of evidence to sustain the finding of the trial court can be brought up for review only by bill of exceptions.³²

³¹ Precede this by obligation to people of the state of Illinois.

³² *People v. Mills, supra.*

CHAPTER LXIII

LIENS' RELEASE (VIRGINIA)

§§

3580 Affidavit

3581 Notice

§§

3582 Petition

3583 Decree

3580 Affidavit

(Venue)

This day personally appeared before me, a in and for the county aforesaid, in the state of Virginia, who made oath before me in my said county that he was the creditor (or his authorized agent, attorney, or attorney in fact, of who was the creditor) under a certain deed of trust (mortgage, vendor's or mechanic's lien), from to trustee, dated, and recorded in the clerk's office of the circuit court of county, D. B., p., and that the debt thereby secured has been paid to him, the said creditor (or, his agent, attorney, or attorney in fact); and that he, the said creditor was when the said lien was satisfied entitled and authorized to receive the same, and that the said notes (bonds or other evidences of debt), evidencing the debt secured by said deed have been canceled and delivered to the person by whom they were paid (or have been lost or destroyed, and cannot be produced).

The said creditor (his duly authorized agent, attorney, or attorney in fact) hereto subscribes his name in further testimony of the payment of said debt. (Here let creditor, his agent, or attorney, sign)

Given under my hand this day of, 19..¹

.....

3581 Notice

To

Take notice, that I shall on the day of, 19.., move the circuit court of the county of, Virginia, to have marked released and discharged a certain deed of trust from to, trustee, dated day

¹Sec. 2498, c. 110, 2 Va. Code Ann., p. 1259.

of, 19.., and recorded in the clerk's office of said court, in D. B., p., the said deed of trust having been given to secure the payment of dollars. This notice is given under section 2498 of the code of Virginia, 1887, and acts amendatory thereto, the undersigned being owner of certain real estate affected by the existence of said deed of trust. The property so affected is briefly described as follows: (Here describe).²

Respectfully,

3582 Petition

To the honorable judge of the circuit court of the county of, Virginia:

Your petitioner respectfully represents that he is owner of certain real estate, described as follows: (Give description); that there is recorded in the clerk's office of this court, in D. B., p., a certain deed of trust from to, and bearing date on the day of, 19.., which said deed of trust affects the property herein described.

That your petitioner has given who is the "person entitled to such encumbrance," twenty days' notice that he would on the day of, 19.., move this honorable court to have said deed of trust marked released and discharged, all of which will appear from the notice of motion herewith filed and returned executed.

Inasmuch, therefore, as twenty years have elapsed since the maturity of said encumbrance, as will appear from the copy of said deed of trust filed herewith, and marked exhibit "A," which under section 2498 of the code of Virginia, 1887, and acts amendatory thereto, raises a presumption that said encumbrance has been paid, your petitioner prays that in pursuance of said statute the said deed of trust be marked released and discharged. And your petitioner will ever pray, etc.²

3583 Decree

Commonwealth of Virginia, }
..... county. } ss.

In the circuit court of county.

To the term, 19..

| | |
|------------|----------------|
| | } In chancery. |
| Plaintiff, | |
| v. | |
| | |
| Defendant. | |

It appearing to the court that, who is interested in a certain lot of land against which a certain encumbrance

² 2 Va. Code Ann., p. 1259.

is recorded, which said lot is described as follows: (Give description) has given twenty days' notice to, the person entitled to such encumbrance, service of which notice was made on the day of, 19.., as will appear from said notice filed with the papers in this cause, that he would apply to this court on the day of, 19.., to have marked released and discharged a certain deed of trust from, trustee, dated day of, 19.., and recorded in the clerk's office of this court in D. B. p.;

And it further appearing to the court that the said has this day been called in open court and hath not appeared or answered;

And it further appearing that more than twenty years have elapsed since the maturity of said encumbrance, raising a presumption of payment, which was not rebutted at this hearing; the court, in pursuance of section 2498 of the code of Virginia, 1887, and acts amendatory thereto, doth adjudge, order, and decree that the clerk of this court do enter on the margin of the page of the book wherein said deed of trust is recorded, as aforesaid, that more than twenty years having elapsed since the maturity of said encumbrance, a presumption of payment is raised, which was not rebutted at this hearing; which entry when so made shall operate as a release and discharge of said deed of trust.³

³ 2 Va. Code Ann., p. 1260.

CHAPTER LXIV

LOST PAPERS AND RECORDS (FLORIDA)

LOST NOTE

§§

3584 Proceeding, nature

3585 Petition

3586 Publication, praecipe

§§

3587 Publication notice

3588 Summons, waiver

3589 Order

LOST NOTE

3584 Proceeding, nature

In Florida this is a special statutory action concurrent with common law or equity proceedings of a similar nature.¹

3585 Petition

To the honorable, judge of said court.

Your petitioner of, respectfully shows:

That heretofore, to wit, on of county, Florida, in signed and delivered to said his certain promissory note payable to the order of said, for the sum of with interest, of which said note the following is a substantial copy (Insert copy of note).

That on the, the said and executed and delivered to the said in the presence of and, as security for said note a mortgage on certain lands situated in county, Florida, described, to wit: (Set forth legal description) containing acres more or less; the acknowledgment of said grantors thereof having been taken at said time before, a notary public; that said mortgage was recorded on in the records of county, in the mortgage book page, a true and certified copy of which mortgage is hereto attached and marked, made a part hereof.

That the said note and the original mortgage, from the time of the delivery thereof to him, and until about the day of, were in the custody of the said; that sometime in the summer of said person-

¹ Sec. 1981, Code 1906.

ally placed said note and mortgage for the safe keeping in at his home, in county, Florida; and that afterwards, to wit, on or about said, when he made search for said note and mortgage the same were not to be found and were lost or destroyed; that as soon as they were so discovered to be lost, he diligently searched said and all other places where they could possibly have been placed; he also made inquiry of all members of his family about them; but said note and mortgage were not and have never been found.

That since said said note and mortgage have not been in the custody or control of said or that of anyone for, or on his account; and that neither of said note nor mortgage have ever been assigned, endorsed, transferred or deposited in pledge or otherwise disposed of by, or for or on account of said; that he has never been able to discover the whereabouts of the note or original mortgage since their loss as aforesaid; and that they are utterly lost and beyond his custody or control.

That the copy of said note as hereinbefore given is a substantial copy of the original note so lost as aforesaid.

That your petitioner and the said are the only parties interested for or against the re-establishment of said lost note.

Wherefore, your petitioner prays that notice shall issue herein as prescribed by the laws of the state of Florida; and that the copy of said promissory note hereinbefore given and contained and attached hereto shall be by order of this court established in lieu of said note, with the full force and effect of said lost note.

.....
 Petitioner.

 Petitioner's attorney.

(Venue)

Before me,, a notary public of the state of Florida, personally came, to me well known as the person described in the above petition, who being duly sworn says that he is the person described in and who is the petitioner in the above petition, that he has read the foregoing petition and that the statements and facts therein contained and made are of his own knowledge and true.

Subscribed, etc.²

3586 Publication, praecipe

(Caption)

To the clerk of said court:

Please make notice by publication in the above cause, as speci-

² Attach copy of mortgage.

fied by section 1534 Revised Statute that I will on, the day of, apply to the honorable, judge of said court, for an order establishing the copy of the lost promissory note as contained in said petition herewith filed in lieu of the original promissory note thereof, lost or destroyed.

Dated, etc.

.....
Petitioner's attorney.

3587 Notice

Notice is hereby given to all persons interested herein to appear in our circuit court at county, Florida, on, the day of, 19.., and show cause, if any they can, why a promissory note, a substantial copy of which is below given, should not, on petition of herein filed on, be established in lieu of said original note alleged therein to have been lost or destroyed at of, Florida, on or about; said petition alleging that petitioner and are the only parties interested for or against the re-establishment of said lost note; said note alleged therein to have been secured by mortgage of and his wife on on county lands, said mortgage being recorded in mortgage book, page, records, county, Florida. A substantial copy of said note is (Insert copy of note).

This the day of, 19..

(Seal)

.....
Clerk of circuit court circuit,
..... county, Florida.

.....
Attorney for petitioner.

3588 Summons, waiver

(Caption)

The above hereby waives summons etc., and accepts notice as prescribed by section 1534 of the Revised Statute in such cases, and of the copy of the petition filed and attached thereto by herein, to establish copy of promissory note made and delivered by him to, in lieu of the original thereof in said petition alleged to have been lost or destroyed, said petition, and a copy of said note being filed in said court this day; and further that the petition aforesaid will be brought on for hearing before said court at in said county on the day of or as soon thereafter as can be heard.

Dated, etc.

.....

3589 Order

(Caption)

This cause came on for final hearing on motion of counsel for petitioner, and it appearing to the satisfaction of the court from the affidavit of petitioner filed herein that a promissory note signed and delivered by in, Florida, on to payable to the order of said, being for the sum of dollars with interest thereon, and being made payable, of which the hereinafter established note is a substantial copy, and which said promissory note was on the secured by mortgage executed and delivered to the said by the said, and witnessed by and, the acknowledgment of said grantors having been taken before said, a notary public for the state of Florida, said mortgage having been recorded on in the records of county, Florida, in mortgage book, page, upon the following lands, to wit. (Set forth legal description) containing acres more or less, had been lost or destroyed; and that neither of said promissory note nor mortgage having been assigned, endorsed, transferred or deposited in pledge, or otherwise disposed of by said or by anyone for or on account of said; and that the aforesaid petitioner had duly filed his petition under oath in this court to establish a substantial copy of said note in lieu of said lost promissory note, of the filing of which petition the aforesaid had due notice of the time and place of hearing thereof, and it also having been made to appear to the satisfaction of the court by the affidavit of the publisher thereof, that due notice to all persons interested therein was given to them to appear in this court on the day of, 19. ., and show cause, if any they can, why the said promissory note should not be so established; that said notice was given by publication once in each week for successive weeks prior to as provided in section 1534 of the Revised Statute of Florida, in the, a newspaper published in county; and that no objection has been filed to the establishment of a copy in lieu of said lost promissory note: it is therefore ordered, adjudged and decreed that the following, to wit, (Insert note) shall be and is hereby established in lieu of the original of said promissory note which is secured by mortgage hereinbefore described; which said original promissory note is hereby decreed to have been lost or destroyed and henceforth null and void; and it is hereby further ordered and adjudged and decreed that the aforesaid promissory note shall have the full force and effect of such original promissory note.

This order may be delivered to the petitioner on his filing with the clerk of said court, a true copy thereof.

Done and ordered at this day of,
19..

.....
Circuit Judge.

CHAPTER LXV

LUNACY

APPLICATION

§§

3590 District of Columbia
3591 Florida
3592 Illinois
3593 Maryland
3594 Michigan
3595 Mississippi

WRIT

3596 District of Columbia
3597 Florida
3598 Maryland
3599 Mississippi

QUASHING WRIT

3600 Motion
3601 Order

HEARING

3602 Order for hearing
3603 Order for examiners
3604 Subpoena
3605 Warrant

INQUISITION

3606 District of Columbia
3607 Florida
3608 Illinois

§§

3609 Maryland
3610 Michigan
3611 Mississippi

MOTION TO QUASH

3612 Maryland

BOND

3613 Illinois

COMMITMENT

3614 Florida
3615 Illinois
3616 Michigan
3617 Mississippi

COMMITTEE

3618 Appointment; petition and order
3619 Claims, petition for allowance and order
3620 Expenditure, petition for authority and order
3621 Removal, petition and order

DISCHARGE

3622 Petition, no estate, and order
3623 Petition, in case of estate, and order

APPLICATION

3590 District of Columbia

In the supreme court of the District of Columbia,
Holding an equity court.

| | | |
|------------------------|---|-------------------------------|
| In the matter of | } | Lunacy docket Number |
| Alleged lunatic. | } | |

To the honorable, the justice of said court.

The petition of,, and respectfully represents:

1. That they are the commissioners of the District of Co-

lumbia, and, as such, are charged with the preservation of the public peace, the protection of the rights of persons and of property, and the prevention of crime in the District of Columbia.

2. That under the provisions of the act of Congress entitled "An act to authorize the apprehension and detention of insane persons in the District of Columbia," etc., approved April 27, 1904, one, who is believed to be insane or of unsound mind, has been apprehended and is now detained at pending a judicial inquiry into h.... mental condition; that said is by represented to your petitioners, and is by them believed to be, an indigent insane person or person of unsound mind, so thathe has not sufficient capacity for the government of self. Your petitioners further believe if said be not an indigent insane person that ..he is an insane person of homicidal or otherwise dangerous tendencies, so that ..he has not sufficient capacity for the government ofself and property; that said has been insane or of unsound mind since, to wit, the day of, 19...; that the cause of h.... insanity or unsoundness of mind, if in fact, it exists, is unknown to your petitioners; but if the representations made to your petitioners be true, the said is unfit to be at large, and is a fit subject for detention and treatment on account of h.... mental condition; and your petitioners believe that ifhe be permitted to remain at large within the said District the rights of person and property therein will be greatly endangered, the preservation of public peace imperiled, and the commission of crime rendered probable.

Your petitioners accordingly pray that the writ *de lunatico inquirendo* may issue out of this honorable court, to the end that the alleged insanity of the said may be inquired into and determined, that such orders may be passed by this honorable court as may be necessary in the premises.

.....

Commissioners of the District of Columbia.

.....
 Solicitor for petitioners.

Subscribed and sworn to before me this day of, 19..

.....
 Notary Public, D C.

Order

Upon consideration of the foregoing petition., it is, by the court this day of, 19..., ordered, that the

rule to show cause why the above mentioned should not be adjudged to be of unsound mind issue, returnable on the day of, 19.., at o'clock .. M.; it is further ordered, that the United States marshal for the District of Columbia summon a jury of twelve good and lawful men of this District, according to the statute in such case made and provided, to appear in this court at the above mentioned date and hour to inquire into the mental condition of the afore-said person.

Justice.

In Equity

Lunacy Docket No.

In re

Alleged to be insane.

Petition for writ
de lunatico inquirendo
and
Order thereon

The clerk will please file.

Solicitor for petitioners.

de lunatico inquirendo

3591 Florida

In court of county judge.

In and for county, Florida.

To the judge of said court:

Your petitioners respectfully represent that they are citizens of the county of and state of Florida; that is also a citizen of the county and state aforesaid; that is personally well known to each of your petitioners, and no more than one of the undersigned is related by blood or marriage to the said, and that their knowledge of physical and mental condition is sufficient to warrant them in the belief that is insane.

They therefore pray that examination be instituted and made into physical and mental condition as by law is provided in such cases.

Thisday of, 19..

¹ Add verification on information and belief.

2 Attach affidavits referred to.

3592 Illinois

State of Illinois, }
 County of } ss.

In county court of county.

To the honorable, judge of said court:

Your petitioner,, would respectfully represent that ..he.. is a reputable citizen of said county; that ..he.. believes that, a resident of county, is insane, or suffering under mental derangement, and unsafe to be at large; and that the welfare of h..self or others requires h.... restraint or commitment to some hospital or asylum for the insane. The facts in the case may be proven by, a regular practicing physician, having personal knowledge of said case, and by, all of whom are residents of this county. The said has property effects

Wherefore, your petitioner prays that a warrant be issued for said and that a venire may be issued for a jury of six good and lawful men, one at least of said jurors to be a qualified physician, to determine the truth of the allegations in the foregoing petition contained, and also, that a subpoena be issued for the witnesses named, returnable at such time as may be fixed by your honorable court.

.....

| | | | | | | |
|----------|--------------------------------|--|-------------------|-------------|---|----------------------------|
| No | County court, county. | In the matter of the alleged insanity of | Petition of | Filed, etc. | Let a writ be issued returnable on the day of, 19.., o'clock .. M. | Judge of the county court. |
|----------|--------------------------------|--|-------------------|-------------|---|----------------------------|

3593 Maryland

In the matter of

In the circuit court No. of

To the honorable, the judge of said court:

The petition of, of, Maryland, respectfully shows:

1, That his mother,, who resides at street,, Maryland, is now and has been for more than years past of that degree of unsoundness of

mind that unfits her to be in possession of her property and to be clothed with the power of alienating her estate or any part thereof.

2, That your petitioner's mother has been a woman of strong personality and active mentality; that she was a nurse on battle fields in the Civil War and during her subsequent years has suffered from the exposure and hardships to which she was subject in that honorable service; that your petitioner's father was a prominent citizen of, at one time being of that state, and held other offices of honor and trust; that many years ago your petitioner's parents separated and his mother came to bringing with her your petitioner and his brother (now deceased); that subsequently the respondent, your petitioner's mother, secured a divorce from her husband, and the latter lived until death in the state of

3, That your petitioner's mother is now years of age; that for many years she has been interested in the temperance cause but more recently has devoted all her time, thought and energy to the woman's suffrage cause and the work of foreign missions; that to such an extent has your petitioner's mother thought upon the objects, aims and problems of the prohibition, woman's suffrage and foreign mission movements, so frequently and earnestly has she written on the subjects, so largely of her income and means has she contributed to these causes and especially to the mission work in foreign fields, that her mind racked by incessant employment and enfeebled by advancing years has given way under the strain and she is now the prey of fixed, systematized and dominating delusions on the above mentioned subjects, and especially on the subject of foreign missions; that the respondent has been for years and is now so much under the influence and control of certain opinions and feelings originating in a morbid and unsound state of mind in reference to the safety of her soul and her duty in regard to the heathen in far off India, Persia and China as to make her a paranaic on these subjects; that by reason of her perverted mental state, the respondent is the victim of imperative conceptions, is bereft of reason and judgment, and is impelled to give almost her all to the foreign mission work to the exclusion of her relatives who have had every reason to expect to be the natural objects of her bounty.

4, That in furtherance of the plans conceived in her unbalanced and disordered mind the said respondent has been for the past several days in consultation with a representative sent here by a foreign mission society with headquarters in, the representative being here in response to an urgent request from the respondent that a representative be sent to arrange for a transfer of almost all her estate

and property to this society or to some one designated by it; that the respondent owns a large number of well secured ground rents in the city of valued at about \$....., and also personalty of great value; that the said property represents largely the estate received by the respondent from your petitioner's maternal grandmother; that during the past few years the respondent has given about \$..... to the cause of foreign missions all the while denying herself even the ordinary comforts of life.

5, That your petitioner is years of age, unmarried and has with the exception of a few brief intervening periods resided with his mother in the city of; that for years he assisted her in the management of her property; that he is now a resident of the state of Maryland.

6, That the respondent is about to strip herself of almost all her property real and personal and by deeds now in course of preparation convey her real estate worth about \$..... to the foreign mission society referred to or to some one whom the organization may name; that the foreign mission society is incorporated under the laws of a state other than the state of Maryland; that the respondent is impelled to her act by her insane delusions and irresistible promptings to duty conjured up by her disordered imagination and overweening brain; that to protect the respondent from herself, to prevent the alienation of her estate with its resulting dependency upon others for support, and to secure to your petitioner that reasonable hope of being the object of the respondent's bounty which as her only son and child he should naturally expect and would certainly receive if his mother were mentally normal it is necessary and also would be to the respondent's benefit and advantage that jurisdiction of her affairs be assumed and a suitable committee or other officer of the court, be appointed to take charge of her estate.

Your petitioner therefore prays your honor that a commission may be issued to the sheriff of to inquire into the lunacy of the said

.....

Solicitors.

(Venuue)

I hereby certify, that on this of, in the year 19.., before me, the subscriber, a notary public, of the state of Maryland, in and for the city of, aforesaid, personally appeared and made oath in due form of law that the matters and facts set forth in the foregoing petition are true to the best of his knowledge and belief.

Witness my hand and notarial seal.

(Seal)

.....
Notary Public.

Ordered this day of, 19.., by the circuit court No. of upon consideration of the foregoing petition and affidavit that the writ *de lunatico inquirendo* and a writ of summons issue as prayed in said petition.

.....

3594 Michigan

State of Michigan, }
County of } ss.

Probate court for the county of
In the matter of

Insane.

To the honorable, judge of said court:

I,, respectfully represent that I reside in the of, in said county, and make this petition as

That said is a resident of the of, in said county, and is now residing with; that is of the age of years; and that has estate of the estimated value of dollars, consisting of

That said is insane and in need of asylum treatment, and that the facts upon which said allegation of insanity is based are as follows:

That the names, relationship, ages and residences of the nearest of kin of said, as I am informed and believe, are as follows:

| Name. | Relationship. | Age | Residence. |
|-------|---------------|------|------------|
| | | | |
| | | | |
| | | | |

I therefore pray that said be admitted to the asylum for the insane as a patient.

.....
P. O.

(Verification)

Order

(Caption)

..... having filed in said court petition, praying that said be admitted to the asylum for the insane, as a patient it is ordered, that the day of, 19.., at o'clock in thenoon, at said probate office, be and is hereby appointed for hearing said petition; it is further ordered, that notice thereof be given by

personal service of a copy of this order on said
at least twenty-four hours previous to said time of hearing.

.....
Judge of Probate.

3595 Mississippi

State of Mississippi, }
..... county. } ss.

To the clerk of chancery court of said county:

The undersigned respectfully reports to you that one is a lunatic or insane person, and is now at large in said county, h.. relations and friends having neglected or refused to place h.. in an asylum.

You are therefore requested to issue a writ of lunacy, as required by the statute.

Sworn to and subscribed before me, this the day of, 19..

.....
.....

No.

State of Mississippi,
..... county.

Ex-parte

.....
.....
Alleged lunatic.

Application for writ
De Lunatico Inquirendo

Filed this the day
of, 19..

..... Clerk.

By D. C.

WRIT

3596 District of Columbia (Rule to Show Cause)

(Caption)

The President of the United States, to, greeting:

You are hereby summoned to be and appear in this court on the day of, 19.., at o'clock, .. M., to show cause why you should not be adjudged to be of unsound mind, and why, if necessary, a committee of your person and a trustee for your estate should not be appointed, as prayed in the petition filed in the above-entitled cause, a copy of which petition is attached hereto.

Witness, the honorable, chief justice of said
supreme court, this day of, 19..

....., Clerk.

By, Assistant Clerk.

....., Attorney.

No.

Lunacy Docket

In the Matter of

.....
Alleged to be of unsound
mind.

Rule to show cause.

Issued 19..

Returned, 19..

....., U. S. Marshal.

3597 Florida

In court of county judge,

In and for county, Florida.

State of Florida, }
County of } ss.

In the name of the state of Florida, to the sheriff of said county, greeting:

Whereas, and have this day filed their petition suggesting the insanity of a resident of the county and state aforesaid, and praying that examination be instituted and made into physical and mental condition, according to law as in such cases made and provided:

You are therefore commanded forthwith to summon Dr. and as a committee of examination, and that within a reasonable time after the service of this summons they are required to secure the presence of, the above alleged insane person, and make such thorough examination of as will enable them to ascertain mental and physical condition at the date of such examination, and if considered insane whether the insanity is acute or chronic, its apparent cause, the particular hallucination, if any, the age, propensities of said alleged insane person, and whether is indigent or possessing sufficient available estate for support.

Given under my hand and official seal at,
this day of, 19..

.....
County Judge.

3598 Maryland

State of Maryland, to, esquire, sheriff of
, greeting:

Because we have received information that,
 of said city, now is and for some time past has been so far de-
 prived of her reason and understanding that she is unfit and
 unable to govern herself, or manage her affairs to her own
 great detriment and our manifest prejudice, and we being
 willing to take care for the indemnity of her the said
 in this behalf, command you, that you diligently in-
 quire by the oaths of honest and lawful men of your bailiwick,
 by whom the truth of the matter may be better known,
 whether the said be so far deprived of her
 understanding that she is altogether unfit and unable to gov-
 ern herself or to manage her affairs as before stated or not,
 and if she be, then from what time and how long, and in what
 manner; and if she enjoys lucid intervals; and when the said
 being in such condition aliened any lands or
 tenements; and if so, then what lands and what tenements
 and where and when; and to whom and what persons, and
 in whose hands or what persons' hands the lands and tenements
 so aliened are; and how and in what manner; and what lands
 and what tenements yet remain and of whom; or what per-
 sons, as well as the lands and tenements so aliened, as the
 lands and tenements so retained to herself are holden; and
 by what persons and how; and in what manner, and how much
 they are worth by the year in all issues, and who is next of
 kin and of what age. And the inquisition hereof distinctly
 and plainly made send to our judge of the circuit court, No.
 of city, under our hands and seals,
 and the hands and seals of those by whom the said inquisition
 is made and taken.

Witness, the honorable, chief judge of the
 supreme bench of, the day of,
 19..

Issued the day of 19...

.....
 Clerk.

Return

The execution of this writ will fully appear by the inquisi-
 tion annexed thereto and returned herewith,
 the within named lunatic, being daily present at said inquisi-
 tion.

..... Sheriff.

3599 Mississippi

State of Mississippi, }
 county. } ss.

To the sheriff of said county, greeting:

Whereas, it has been suggested in writing by, a citizen of said county, to the clerk of the chancery court of said county, that, a resident of said county, is a lunatic, or insane, and that the friends or relations of said alleged lunatic neglect or refuse to place in a lunatic asylum, and permit to go at large;

Therefore, you are hereby commanded to summon as soon as may be practicable, the alleged lunatic, and six discreet persons of said county, not of kin to, or interested in the state of said alleged lunatic, to assemble at some convenient place in said county, as soon as may be, and after being empaneled by you, and duly sworn to well and truly inquire on all the evidence brought before them whether or not said is a lunatic or insane, and mentally incapable of taking proper care ofself or estate. The result of said inquisition shall be written hereon and signed by all the jurors who concurred therein. And said verdict, or finding of said inquest, and all the papers in this matter, together with this writ, and the manner in which you shall execute the same, you are hereby directed to return and make known to our said court forthwith.

Given under my hand and seal of office this day of
, 19..

....., Clerk.
, D. C.

QUASHING WRIT**3600 Motion (D. C.)**

(Caption)

Now comes, son and one of the presumptive heirs of the said, by his attorney, who appears specially in this behalf, and not generally, and for his father,, to object to the jurisdiction of the court over the person of his father, and moves the court to quash the return of process made in this matter by the United States marshal because the said return shows on its face that personal service or process was not had according to law, and that said service is unconstitutional, illegal and void and deprives the said of his liberty and property without due process of law, and that the statute under which the proceeding is taken, particularly if said service be

not quashed, is contrary to the provisions of the fifth amendment to the constitution of the United States.

.....
Specially and not generally as attorney for acting in behalf of his father for the purpose of this motion alone.

3601 Order

(Caption)

This cause coming on to be heard on motion specially made by on behalf of his father,, to quash the return of service made by the United States marshal on the subpoena issued on the day of requiring said to appear on, the day of, at o'clock in the noon to show cause why he should not be adjudged of unsound mind and why a committee of his person and trustee of his estate should not be appointed because the said return does not show that personal service of said process has been had on, it is by the court this day of ordered, adjudged and decreed that said return of said process be and the same hereby is quashed and for naught held for want of jurisdiction over the person of the said

HEARING

3602 Order for hearing (Ill.)

State of Illinois, }
County of } ss.

In the county court of county.
In the matter of the alleged insanity }
of }

Whereas, it has been represented to the honorable, judge of this court, by in a petition duly verified, that is believed to be insane; it is ordered by the court that said case be called for trial at the court room, in the detention hospital, street, in the city of, county of, and state of Illinois, on the day of, 19.., at .. o'clock .. M.

It is further ordered by the court, that a copy of this order be delivered to said, alleged to be insane, on or before the day of, 19..

.....
Judge of the county court of county.

3603 Order for examiners

State of Michigan,

The probate court for the county of

At a session of said court, held at the probate office in the city of in said county, on the day of, 19..

Present, honorable, judge of probate.

In the matter of

Insane.

..... having filed in said court petition praying that said be admitted to the asylum for the insane, it is ordered that and, two legally qualified physicians, be and are hereby appointed to examine said as to such alleged insanity.

.....
Judge of Probate.**3604 Subpoena (D. C.)**

In the supreme court of the District of Columbia.

In re alleged lunacy of } No., Lunacy Docket.
..... }

The President of the United States to greeting:

You are hereby commanded to be and appear before the justice of this court assigned to the hearing of lunacy cases, in court room No., on the day of, 19.., at .. o'clock .. M., to testify the truth touching the above matter, and not depart the court without leave.

Witness, (chief justice, etc.).

No.
Lunacy Docket

In re Alleged Lunacy of

Spa. ad. Test.

Issued, 19..

Summoned the within-named witness as follows:

.....
U. S. Marshal.

(Illinois)

State of Illinois, }
County of } ss.

In county court of county.

The people of the state of Illinois, to the sheriff of said county, greeting:

We command you to summon, if he can be

found in your county, to appear before our county court, street, in the city of, on the day of, 19.., at M., to testify and the truth to speak in the case now pending where is to be tried on the alleged charge of insanity.

And have you then and there this writ, and make return thereon in what manner you have executed this writ.

Witness, etc.

3605 Warrant (Ill.)

(Caption)

The people of the state of Illinois, to the sheriff of said county greeting:

Whereas, it has been represented to the honorable, judge of this court, by in a petition duly verified, that is believed to be insane; and whereas, said judge has appointed the hearing of said petition for the day of, 19.., at M., and has ordered that until and pending the hearing aforesaid, said alleged insane person be committed to the custody of the keeper of the department for the insane, in the court house, in said county:

You are therefore hereby commanded to arrest said forthwith, and convey and deliver h... to the keeper of the department for the insane, in the court house, in, county, Illinois; and said keeper is hereby commanded to receive and keep said in safe custody until the day of, 19.., at M., at which time said keeper is commanded to have h... before our county court, and then and there to await and abide the result of the trial.

And have you then and there this writ, and make due service as the law directs.

Witness, (clerk, etc.).

..... Clerk.

INQUISITION

3606 District of Columbia

(Caption)

Now come here as well the commissioners of the District of Columbia, by their attorney, as, the alleged lunatic in proper person and (Insert twelve names) a jury of good and lawful men of this District, selected from the panel serving in according to the provisions of the statute in such case made and provided, who being duly sworn to well and truly inquire into the allegations of the petition filed herein, after the case is given them in

charge, upon their oath say they find the said
 to be of unsound mind, suffering from accom-
 panied with homicidal (.....) tendencies; that
 has not sufficient capacity for the government of self,
 and property; that has been so insane since
 that said lunatic has alienated;
 that the following lands and tenements remain to
 to wit: (Describe); (that no real estate remains to);
 and that has a, named
 and children of the following names and ages:
, age years;, age
 years, (and that has neither nor
 children).

.....
 Justice.

Order of confirmation

(Caption)

Upon consideration of the verdict of the jury in the above
 entitled case, and no cause being shown to the contrary, it is
 this day of, 19.., adjudged, or-
 dered and decreed that said verdict be, and hereby is, con-
 firmed.

.....
 Justice.

3607 Florida (Committee's report)

In the court of county judge,

In and for county, Florida.

To the judge of said court.

Your committee appointed to examine into the alleged in-
 sanity of, having performed the duty assigned
 to them, beg to submit the following report:

We have made such thorough examination as is required by
 law, and find the said to be insane; that
 insanity is, the apparent cause being
 and the particular hallucination being; that
 said 's age is; that re-
 quires mechanical restraint to prevent from self-
 injury or violence to others; and that does
 possess sufficient available estate for support.

....., 19..

..... M. D. }
 } Committee.

3608 Illinois

(Caption)

And now comes the said, who is alleged to be insane, in custody of the sheriff of county; also comes, at whose instance he was arrested; and thereupon also come the jurors of a jury of good and lawful men, to wit:, a doctor of medicine, and (Name the other jurors) who, after being duly empaneled and sworn according to law, and having heard the evidence adduced and the arguments of counsel, retire, in charge of an officer of the court, to consider of their verdict; and thereupon return into court, and in the presence of the said, deliver their verdict in the words and figures as follows, to wit:

State of Illinois, }
County of. } ss.

We, the undersigned, jurors in case of, who is alleged to be insane, having heard the evidence in the case, are satisfied that the said is insane, and is a fit person to be sent to a state hospital for the insane; that he is a resident of the county of, in the state of Illinois; that h.... age is years; that h.... disease is of duration; that the cause is; that the disease is with h.... hereditary; that he is not subject to epilepsy; that he does manifest homicidal or suicidal tendencies, and that clothing and a bond therefor should be furnished and the cost should be paid by (or that he is a pauper). Which verdict is signed by each of the jurors above named.

Whereupon, upon the verdict aforesaid, it is considered and adjudged by the court that the said is an insane person, and it is ordered that said be committed to, a state hospital for the insane. And it appearing to the court that it is necessary that said be temporarily restrained of h.... liberty, it is therefore ordered that, pending h.... admission to said hospital, ..he be committed to the county insane asylum.

3609 Maryland

(Caption)

This inquisition, taken this day of, 19.., at the court house in the city of in the state of Maryland, before, esquire, the sheriff of the said city, in virtue of the annexed writ *de lunatico inquirendo* to him directed, issued out of the circuit court No. of, upon the oaths or affirmations of (Name fourteen jurors including sheriff), good and lawful men of the

bailiwick, who being sworn and charged upon their oaths and affirmations to inquire, &c., &c., witnesseth:

That the said jurors do find that the said, in the said writ named, is of unsound mind so that she is not capable of the government of herself or the management of her estate, and that she hath been in such state of mind for more than one year past, but how she became so, the jurors aforesaid cannot say, unless by the visitation of God.

And the jurors aforesaid do also find that the said is seized and possessed of a very large and valuable estate, real and personal, situate and being in this city and elsewhere, but the particular description, amount and value thereof they are unable at this time to ascertain; and they do find that she hath, when in such unsound state of mind, alienated a part thereof.

And the jurors aforesaid do also find that the nearest of kin to the said is, her son, and that the nearest heir at law is the above named person of full age.

In witness whereof, as well the jurors aforesaid, as the said, esquire, sheriff, have hereunto subscribed their names and affixed their seals the day and year first therein mentioned.

....., Foreman, (Seal)
(and other signatures and seals including sheriff's).

3610 Michigan (Caption)

I,, do hereby certify that I am a permanent resident of the of in said county, and a graduate of, an incorporated medical college; that I am registered according to law, and have practiced as a physician years; that, acting under the direction and by the appointment of said court, I did on the day of, 19.., personally examine said

I further certify that said is insane, and a proper person for care and treatment in an asylum for the insane, and that I have formed this opinion on the following grounds, to wit:

I further certify that I am not related by blood or marriage to said insane person, or to the person applying for this certificate; that I am not a trustee, the superintendent, proprietor or officer, or a regular professional attendant of the asylum for the insane, and that my qualifications as a medical examiner in insanity have been duly certified to by the clerk of the county of

..... M. D.
Subscribed and sworn to before me, this day
of, 19...

.....
Judge of Probate.

County clerk's certificate

(Caption)

I hereby certify, that, of, is a duly registered physician and surgeon, and has the qualifications prescribed by the laws of this state for the practice of medicine and surgery herein, as shown by certificate of registration now on file in my office.

(Seal)

.....
County Clerk.**3611 Mississippi**

State of Mississippi, }
..... county. } ss.

We, the undersigned, summoned by the sheriff of said county, by virtue of a writ of lunacy to him directed by the chancery clerk of said county (which writ is hereto annexed), being first duly empaneled and sworn to make inquisition concerning the lunacy or insanity of one and whether or not said is mentally incapable of taking proper care of self, or estate, after diligent inquiry in the premises, upon our oaths do find, say and certify, that at the time of taking this inquest, said is and is capable of taking proper care of self and estate, and that has been in that condition for the space of and should be confined in the state lunatic asylum.

Certified under our hands and seal this day of, 19..

(Six signatures and seals)

MOTION TO QUASH

3612 Maryland

Ex parte in the matter of

.....
In the circuit court No. of
..... by, her solicitors, moves the court to quash and set aside the inquisition of the jury and return of, sheriff of, in the above proceeding, and assigns as reasons therefor the following:

1, Because of irregularities in the method in which the jury was selected and empaneled and sworn in these proceedings.

2, Because of errors and irregularities in said inquisition and return apparent on the face of the same.

3, Because the said jury refused to find that the said was a lunatic, but was of unsound mind with-

out lucid intervals, yet did not find the character and extent of the same.

4, Because the same inquisition was tried and heard by the sheriff's clerk instead of the sheriff of, as required by said writ of inquisition.

5, Because the finding of the said jury that the said was of unsound mind and incapable of the government of herself and the management of the estate was against the evidence and the weight of the evidence adduced before said jury.

And for other reasons to be assigned at the hearing of this motion.

.....
Solicitors for

(Verification)

BOND

3613 Illinois

Know all men by these presents, that we, and, of the county of and state of Illinois, are held and firmly bound unto the trustees of the hospital for the insane, or county of, in the state of Illinois, in the sum of dollars, for the payment of which we jointly and severally bind ourselves, our heirs, executors and administrators, firmly by these presents.

The condition of this obligation is, that whereas,, insane person of the county and state aforesaid, has been admitted as a patient into the (said hospital for the insane, or county insane asylum):

Now, therefore, if we shall find said patient in suitable and sufficient clothing whilst he may remain in said (institution or asylum), and shall promptly pay for such articles of clothing as it may be necessary to procure for said at the hospital, and shall remove from said (hospital or asylum) when required by the (trustees or medical superintendent of said asylum) to do so, then this obligation to be void; otherwise to remain in full force.

Witness our hands and seals, this day of 19..

(Signatures and seals)

State of Illinois, }
County of } ss.

I,, clerk of the county court of said county, do certify that, who are named in and whose names are, in their own proper hand-writing, subscribed to their foregoing bond, have been approved as securities

therein, and as being good and sufficient to meet and duly respond to the conditions of said bond.

In witness whereof, etc.

COMMITMENT

3614 Florida

(Caption)

In the name of the state of Florida, to the sheriff of said county, greeting:

Whereas, on the day of, 19.., this court, upon petition presented thereto, did appoint, M. D.,, and, a committee to inquire into the sanity or insanity of, a resident of the county aforesaid; and

Whereas, said committee has made its report to this court to the effect that they find the said to be insane; that insanity is; the apparent cause being, and the particular hallucination being; that requires mechanical constraint to prevent the infliction of violence by upon self or other persons; and that: it is therefore adjudged by the court that the said is so insane.

You are therefore commanded forthwith to deliver the said to the superintendent of the Florida asylum for the indigent insane, for care, maintenance and treatment.

Given under my hand and seal this day of, 19..

.....
County Judge.

3615 Illinois

State of Illinois, }
..... county. }ss.

The people of the state of Illinois, to, greeting:

You are hereby commanded forthwith to apprehend, who has been declared to be insane, and to convey her to the hospital for the insane (and you are hereby authorized to take to you aid and assistance, if deemed necessary, one of whom shall be a female of reputable character and mature age), and of this warrant make due return to this office after its execution.

Witness my hand and the seal of the county court of county, this day of, 19..

.....
Clerk of the county court of county.

..... Hospital for the Insane.
 Received, this day of, 19., from
, the patient named in the within warrant.

.....
 Superintendent.

County court of
 county.

In the matter of

 An insane person.

Warrant

To the
 county insane asylum.

Served this warrant by
 delivering said named
 to the
 county
 insane asylum at,
 Illinois.

Filed, 19..
 Clerk

3616 Michigan

(Caption)

..... having been appointed for hearing the petition of praying that said be admitted to the as a patient, and due notice of the hearing on said petition having been given as required by law and as directed by said court, the said petitioner appeared

It appearing to the court upon filing the certificates of two legally qualified physicians and after a full investigation of said matter with the verdict of a jury that said is insane and a fit person for care and treatment in said asylum, and that should be admitted to said asylum as a patient, it is ordered that said be admitted to said asylum as a patient; and it is further ordered that be and is hereby authorized and directed to remove said to said asylum, with full power and authority for that purpose.

.....
 Judge of Probate.

3617 Mississippi

The state of Mississippi, to the sheriff of county, in said state:

Whereas, was, on the day of, 19., duly adjudged a lunatic or insane by a jury of six freeholders, competent jurors of the body of said county;

You are therefore hereby commanded to arrest the said

..... forthwith and place h.... in one of the asylums of the state of Mississippi for the care and treatment of lunatics and insane persons, if there be a vacancy; and if not, to confine h.... in the jail of said county until there be room in one of said asylums.

Given under my hand and official seal, and issued, this the day of, 19..

Chancery clerk, county, Miss.
By, Deputy Clerk.

COMMITTEE

3618 Appointment, Petition (D. C.)

(Caption)

The petition of respectfully shows unto the court:

1, That he files this petition under and by virtue of the provisions of an act of Congress approved February 23, 1905, entitled "An Act to change the lunacy proceedings in the District of Columbia where the commissioners of said district are the petitioners, and for other purposes."

2, That petitioner is a brother of and presents this petition on behalf of the nearest relatives of the said

3, That said was married to, who departed this life during the month of, leaving surviving him the said, his widow, and, who was years old on the day of, 19..; (Enumerate all of the children in the same way); that the said (husband) left a last will and testament which was duly admitted to probate by this court sitting as a probate court on the day of, in administration case number, probate docket, by the terms of which will all of the property of the said, real and personal, is bequeathed to the said widow,

4, That by virtue of the said will the said became the owner of the house and lot on the, being part of the land called, which is worth about the sum of dollars, and which, at the time of the death of the said, was subject to an incumbrance of dollars; that the said also received as beneficiary under certain insurance policies about the sum of dollars, from the proceeds of which she paid the said sum of dollars with interest, and she is now the owner in fee simple of the said property which is described as (Describe property) in the county of, District of Columbia, as the same is shown

by the plat of the proposed highway extension of the District of Columbia, in the office of the surveyor of the District of Columbia; and that the said was on, to wit, the day of, 19.., by a jury duly empaneled found to be insane and by order of this court, approving the verdict of said jury, adjudged to be insane, and her commitment to the government hospital for the insane ordered.

5, That at the time of her adjudication of insanity she was possessed of said property described (Give description) in the county of, District of Columbia, as the same is shown by the plat of the proposed highway extension for the District of Columbia, in the office of the surveyor of the District of Columbia, and of personal property in cash of about the sum of dollars.

Wherefore, the premises considered, your petitioner prays that a suitable person may be appointed as committee of the person and estate of the said, with authority to take charge of and manage her said estate; and for such other and further relief as the nature of the case may require or as to the court may seem suitable and proper.

.....
Petitioner.

.....
Attorney for petitioner.
(Verification)

b

(Caption)

The petition of respectfully shows to the court as follows:

1, That he is a citizen of the United States and resident of the District of Columbia and the husband of the above mentioned

2, That the said was on the day of, 19.., by the verdict of a jury in this court adjudged to be of unsound mind and said verdict was confirmed by the order of this court on the day of, 19.., and thereafter said was committed to asylum for the insane, in the District of Columbia.

3, That said is the owner of premises (Describe same) which formerly rented for a month, but which has not been rented for the past months.

4, That said has no near relative living in the District of Columbia or elsewhere as far as petitioner knows.

The premises considered, your petitioner prays that this honorable court pass an order appointing him committee and

trustee of the person and estate of said, and that he may have such other and further relief as to the court may seem necessary and proper.

(Verification)

Order

(Caption)

Upon consideration of the petition of, filed in the above entitled cause, it is this day of, 19.., ordered, adjudged and decreed that the said be and he is hereby appointed committee and trustee of the person and estate of the said upon his giving bond in the sum of dollars, conditioned upon the faithful performance of his trust.

(Maryland)

(Caption)

The return of the inquisition taken in the above case having been submitted for confirmation, and it appearing that the writ of subpoena was duly served upon, and it further appearing that the said was duly notified of said proceedings and attended before the sheriff's jury summoned in these proceedings, in accordance with the writ *de lunatico inquirendo* issued by the clerk of this court, and was represented at said hearing by counsel, and offered evidence before said sheriff's jury and took part in the cross-examination of certain of the witnesses produced by the petitioner; and the said return and exceptions filed to the confirmation of said inquisition together with the motion of quash and the exceptions to the evidence, and the other proceedings having been duly read and considered and counsel for the respective parties having been heard:

It is thereupon, this day of, 19.., by the circuit court No. of, adjudged, ordered and decreed that the exceptions to the confirmation of the said inquisition and the exceptions to the testimony and the motion to quash be and the same are hereby overruled, except the exception to the witnesses which is sustained, and the said inquisition be and it is hereby ratified and confirmed; and it is further ordered that and be and they are hereby appointed committee of the person and estate of the said, with full power and authority to take charge of and manage the property and to assume the control of the person and estate of the said, under direction of this court; provided, however, that before the said persons shall enter upon the performance of the duties as said committee, said persons

shall give bond in the penalty of dollars with surety to be approved by the clerk of this court, and said bond shall be conditioned upon the faithful performance by said parties of the duties of said committee.

(Michigan)

(Caption)

I,, respectfully represent that I reside in the of, in said county, and make this petition as of; that said is a resident of the of, in said county, and is possessed of estate within said county; that the estimated value of said estate is as follows: real estate, \$..... or thereabout; personal estate, \$..... or thereabout, as I am informed and believe; that said is of the age of years or thereabout; that is mentally incompetent to have the charge, custody and management of person and estate; and that it is necessary that a guardian be appointed of person and estate

I further represent that the names, relationship, ages and residences of the nearest relatives and presumptive heirs at law of said, as I am informed and believe, are as follows:

| Name | Relationship | Age | Residence |
|-------|--------------|-------|-----------|
| | | | |
| | | | |

I therefore pray that or some other suitable person, be appointed guardian of the person and estate of said

.....
P. O.....

(Verification)

3619 Claims, Petition for Allowance (D. C.)

(Caption)

The petition of respectfully shows unto the court:

1, That he is the committee of the person and estate of duly appointed, qualified and acting.

2, That the following bills have been presented to your petitioner, on account of services rendered as charges against the property of, to wit: (Insert itemized statement). That the charge for water rent is long over due, and is a proper charge against the estate of said; that the charges of and for services rendered are in petitioner's judgment proper and reasonable charges against the estate of the said

Wherefore, the premises considered, your petitioner prays that an order may be passed by this honorable court authorizing him to pay to the parties mentioned in the foregoing petition the amounts set opposite their respective names in full for the accounts rendered; and for such other, etc.

(Verification)

Order

(Caption)

Upon consideration of the petition of filed herein on the day of, and the charges for services rendered, and for water rent in the petition being considered proper and reasonable charges against the estate of the said, it is by the court, this day of, 19.., ordered that committee of the person and estate of be, and he is hereby authorized and directed to pay to the persons whose names are set forth in said petition the amounts appearing opposite their respective names.

3620 Expenditure, petition for authority (D. C.)

(Caption)

The petition of respectfully represents:

1, That he is the committee of the person and estate of duly appointed, qualified and acting.

2, That the estate of the said consists of a house and lot near containing acres and known as parcel number in the District of Columbia, of the value of about dollars, which is now free from all incumbrance, and also of the sum of dollars in cash now deposited to the credit of your petitioner, as committee in the bank, District of Columbia.

3, That the said is now confined in the government hospital for the insane at, District of Columbia, for treatment, at the rate of dollars per week for board and medical attention.

4, That the following obligations have been incurred by your committee which are properly chargeable against the estate of the said lunatic, to wit: (Insert itemized account), which your petitioner asks authority to pay and to charge the same against the funds in his hands as committee.

5, That in order to maintain and support the said and provide the necessary medical treatment for her at the government hospital for the insane, the disbursement of dollars per week to said hospital will be required, and petitioner asks that he be given authority to make such disburse-

ment without further order of this court, so long as it shall be necessary to keep said lunatic under treatment in said hospital.

Wherefore, the premises considered your petitioner prays that he be given authority to pay the obligations herein set forth; that he be authorized and directed to pay the sum of dollars per week to the government hospital for the insane for board and medical treatment of said; and for such other, etc.

.....
Committee of the person and estate of

.....

Attorney for committee.

(Verification)

Order

(Caption)

Upon consideration of the petition of filed herein on the day of, 19.., it is by the court this day of, 19.., ordered that the said, as committee of the estate of be, and he is hereby authorized and directed to pay the obligations set forth in said petition; and it is further ordered that petitioner be and he is hereby authorized to pay the sum of dollars per week to the government hospital for the insane for the board and treatment of said, without further order of this court, so long as she is confined at said institution; and it is further ordered that said committee shall be given credit in his account for the disbursements herein authorized.

3621 Removal, petition (D. C.)

(Caption)

The petition of respectfully shows unto the court:

1, That he is the committee of the person and estate of duly appointed, qualified and acting.

2, That since the said was adjudged insane by this court she has been cared for at the government hospital for the insane under an order of commitment of this court; that she is very much improved and in the opinion of the petitioner she should be removed from her present environment and placed in a sanitarium where she may receive further treatment; that petitioner is informed and therefore avers that on the day of, 19.., the said escaped from the said government hospital for the insane and spent days away from that institution with friends to whom she expressed the strongest desire that she should

be released from her commitment in the government hospital for the insane; that in the opinion of petitioner a recovery of the said is very much retarded by reason of her strong feeling of antipathy to her future retention at the hospital; and in affiant's opinion, she will recover much more speedily if placed in a sanitarium satisfactory to her, and in which the environment will be congenial; that the said was originally committed to the said government hospital for the insane because it was found by a jury of this court that she was suffering from acute melancholia with a homicidal tendency.

3, That petitioner has investigated and finds that she may be committed to a sanitarium at for treatment, and is informed by the said that such commitment is desired and would be congenial to her, that the said sanitarium will care for her for compensation at the rate of dollars per month.

4, That the estate of the said consists of property near of the value of about dollars and a small amount of cash now on hand in bank; that in the judgment of petitioner, the expenditure of such a sum as would be necessary to insure treatment at such sanitarium is justified, and he therefore recommends the same to the court.

5, That in connection with the property owned in this estate certain repairs such as (Describe same) have become necessary, in order to insure the continued rental of the same; and petitioner asks authority to make such expenditure as may be necessary and proper in his judgment, to properly maintain the said property.

Wherefore, the premises considered, your petitioner prays, that an order may be passed by this honorable court authorizing the removal of the said from the government hospital for the insane to the at for continued treatment; that he may be authorized to spend such sums for repairs and maintenance of the property herein involved as may be necessary; and for such other and further relief as may be necessary or to the court may seem proper.

.....

.....

Attorney for petitioner.

(Verification)

Order

(Caption)

Upon consideration of the petition of, committee of the person and estate of; and it ap-

pearing that the proper officer of the government hospital for the insane has consented to the removal of from the said government hospital for the insane; it is by the court, this day of, 19.., ordered that as committee of the person and estate of be and he is hereby authorized and directed to remove the said from the said government hospital for the insane to the at and pay for her maintenance and support at said at the sum not in excess of dollars per week during such time as she may remain there, and to defray such expenses incident to her removal to said as may be necessary and proper; and it is further ordered that as committee of the person and estate is hereby authorized to pay such charges as may be made by workmen and others who may perform necessary services in connection with the proper maintenance of the real estate herein involved.

.....
Justice.

The government hospital for the insane consents to the above.

.....
Assistant physician and superintendent.

DISCHARGE

3622 Petition, no estate (D. C.)

(Caption)

The petition of respectfully shows to the court as follows:

1, That on the day of, 19.., a jury in this court found to be of unsound mind and she was on the same day committed to the government hospital for the insane.

2, That on the day of, 19.., your petitioner was appointed committee and trustee of the person and estate of the said

3, That the said was the owner of premises known as number avenue, which originally rented for amount, which was not rented at the time of her commitment to the government hospital aforesaid and has not been rented to this day; and that this petitioner has no credits in his hands belonging to the said

4, That on the day of, 19.., there was filed in the clerk's office of the supreme court of the District of Columbia a sworn statement of the senior assistant physician and acting superintendent of the said government hospital

for the insane that the said had recovered her reason and had been discharged from treatment in said hospital.

The premises considered, your petitioner prays that he may be discharged as the committee and trustee of the personal estate of the said and that she may be declared to be a person of sound mind; and for such other and further relief as to the court may seem necessary and proper.

.....
Committee.

(Verification)

Order

(Caption)

Upon consideration of the petition of, committee and trustee of the person and estate of; it appearing to the court that the said trustee has not become possessed of any assets of the said; and it appearing further that the senior assistant physician and acting superintendent of the government hospital for the insane has filed his certificate with the clerk of this court, showing that the said has recovered her reason and has been discharged from treatment from said hospital, it is by the court this day of, 19.., ordered that the said committee and trustee be discharged, and that the said be and she is hereby declared to be a person of sound mind.

3623 Petition, in case of estate (D. C.)

(Caption)

The petition of respectfully shows unto the court:

1, That by verdict of this honorable court brought in during the month of, petitioner was adjudged to be suffering from acute melancholia and her commitment to the government hospital for the insane directed.

2, That after remaining in said government hospital for the insane for some months, during the month of,, as committee of the person and estate of petitioner requested the removal of your petitioner for care and treatment to the sanitarium at, to which request the officers of the government hospital for the insane acceded, and the petitioner was accordingly removed to said sanitarium where she remained for a further period of months; that thereafter petitioner came to this city, and submitted to special treatment, and now avers that she is in full mental and physical strength and fully capable of managing her own affairs and caring for her family.

3. That the verdict of the jury, rendered as aforesaid, was based upon the testimony of and who testified that the petitioner required such treatment as she received in the said institutions; that the said physicians examined petitioner on the day of, 19.., and have certified, as shown by their affidavits hereunto annexed and prayed to be read as part hereof, that your petitioner is fully restored to health both physically and mentally.

4. That, brother of petitioner, was appointed by this honorable court to manage petitioner's estate, that petitioner has carefully investigated his management thereof, and is fully satisfied with the account which has been presented by to this court for approval, and your petitioner consents that it may be approved in the form in which it is now filed in this court.

Wherefore, the premises considered your petitioner prays that an order may be passed by this honorable court adjudging your petitioner to be of sound mind and health and declaring the petitioner to be fully capable of managing and handling all of her affairs; that the account showing receipts and expenditures made by may be approved; and for such other, etc.

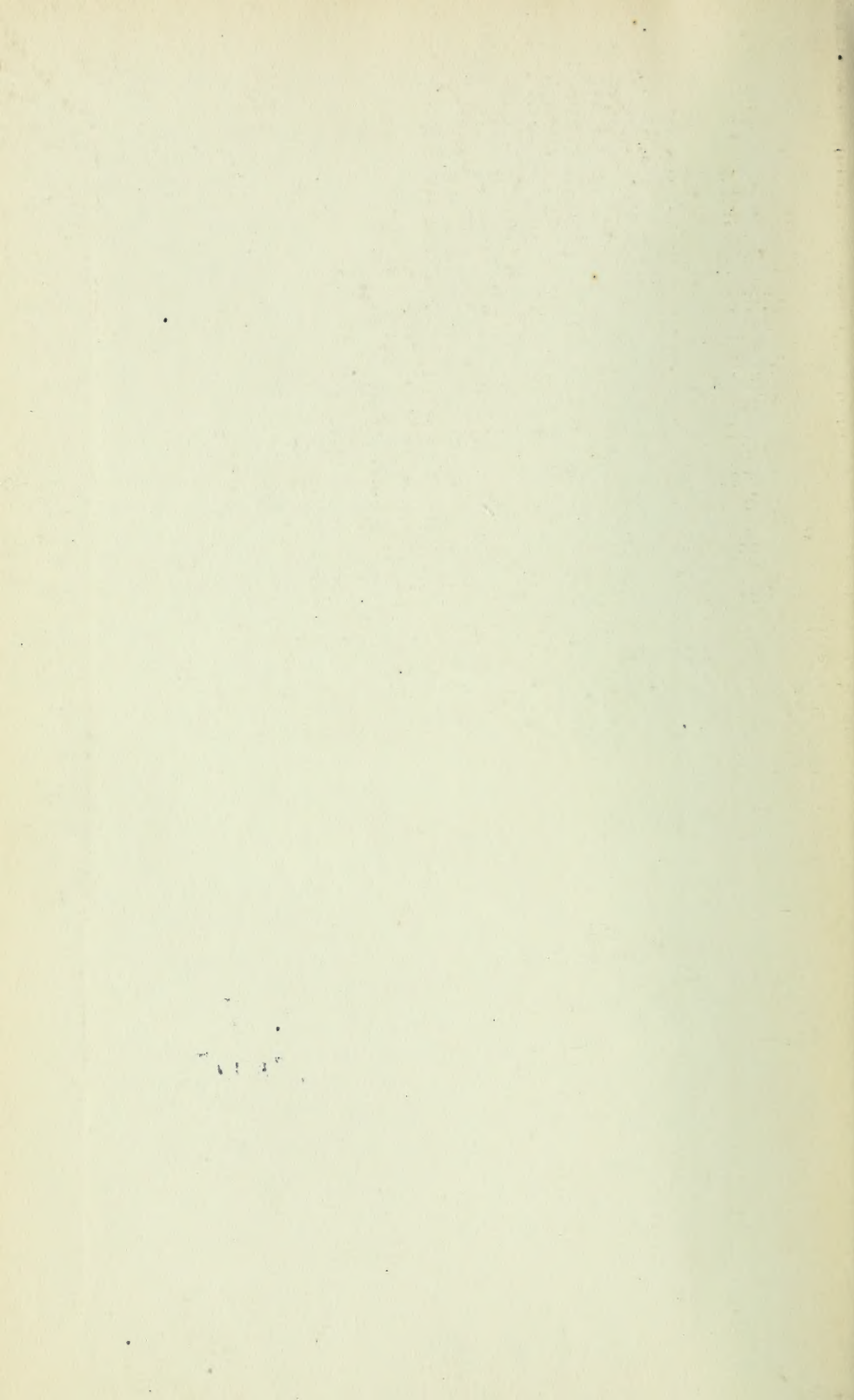
(Verification)

.....

Order

(Caption)

Upon consideration of the petition of filed herein on the day of, 19.., it is, by the court this day of, 19.., ordered, adjudged and decreed that is found to be fully restored to mind and health and that she is no longer required to be subjected to treatment for acute melancholia; and it is further ordered that, who was appointed committee of the person and estate of said be, and he is hereby discharged, and his account filed herein on the day of, be, and the same is hereby approved; and the said, as committee, is hereby authorized and directed to relinquish all claims to real estate owned by and cease to assert any claim of title thereto; and he is hereby further authorized and directed to turn over to the said all personal property remaining in his possession as shown by said account.



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